OPEN BEACHES

HEARINGS

BEFORE THE

SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION AND THE ENVIRONMENT

OF THE

COMMITTEE ON MERCHANT MARINE AND FISHERIES HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

FIRST SESSION

ON

PUBLIC ACCESS TO BEACHES

H.R. 10394 and H.R. 10395

BILLS TO AMEND THE ACT OF AUGUST 3, 1968, RELATING TO THE NATION'S ESTUARIES AND THEIR NATURAL RESOURCES, TO ESTABLISH A NATIONAL POLICY WITH RESPECT TO THE NATION'S BEACH RESOURCES.

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OPEN BEACHES

THURSDAY, OCTOBER 25, 1973

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON FISHERIES AND WILDLIFE
CONSERVATION AND THE ENVIRONMENT OF THE
COMMITTEE ON MERCHANT MARINE AND FISHERIES,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:10 a.m., in room 1334, Longworth Office Building, Hon. Bob Eckhardt presiding.

Mr. ECKHARDT. The hearing will be in session.

The Fisheries and Wildlife Conservation Subcommittee has before it today H.R. 10394 and other similar bills, designed to protect and insure the public rights to access and use of our Nation's ocean shorelines.

The legislation does this in several ways. It prohibits erection of barriers which interfere with public ingress and egress of public beaches. It recognizes certain public rights to the use of beaches. It provides evidentiary rules governing proof of public right, it authorizes the U.S. Attorney General to bring actions to judicially establish and protect the public right to beaches, and it creates a Federal-State relationship to acquire and maintain public beaches.

First, a word as to the public demand which this legislation is intended to meet.

John Graves has said in "Goodby to a River":

> They say our protoplasm, the salt of its juices the same thing still as sea waters yearns back toward that liquid brew, and I guess that may be so.

One only has to visit New York's Long Island, or the warm sands of Padre Island, Texas, on a summer day to grasp the truth of what Graves was saying.

For instance, annual attendance at the major public beaches on Long Island totals more than 7 million—the most extensive used area is Jones Beach State Park, which has an annual attendance of about 13 million, or equivalent to 6 million per mile for the developed area.

On the outer part of the Island at Robert Moses Park, the annual attendance of 2 million would indicate an intensity of about 500,000 per mile.

Second, it is appropriate as a preface to this hearing to consider the physical dimensions of beach availability and restriction. In the United States, including Alaska, there is a total of 84,240 miles of shoreline, according to the national shoreline study completed in

1971. Only about 4 percent of that shoreline is available for public recreation. Alaska accounts for 47,300 miles of that shoreline, and in the remaining 49 States, there are 36,940 miles of shoreline, with about 12,150 miles of that total having beach frontage.

However, that does not mean that the entire 12,150 miles is on ocean front, or on the Great Lakes. Some of that beach frontage is on the landward side of barrier islands and peninsulas, and not subject to the legislation we have here before us.

Of that total shoreline in the 48 States, I would like to point out that only 3,400 miles, a mere 9 percent, are open for public recreation. This includes the nine national seashores, with a total of 467 miles. It also includes an undetermined number of miles fronting on bays and estuaries, many of which have no beaches. That small amount of beach land still available to the public is gradually being eroded by developers and other private littoral owners blocking existing means of public access to beaches customarily used by the public.

This legislation is for the purpose of establishing by law the public right to the beaches, and we hope in this hearing to develop positions and facets which will be helpful to the committee in finding and formulating a bill on the subject matter.

Let the bills and departmental reports appear in the record at this point.

[The bills and departmental reports follow:]

[H.R. 10394 and H.R. 10395, 93d Cong. First Sess.]

BILLS to amend the Act of August 3, 1968, relating to the Nation's estuaries and their natural resources, to establish a national policy with respect to the Nation's beach resources

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to authorize the Secretary of the Interior, in cooperation with the States, to conduct an inventory and study of the Nation's estuaries and their natural resources, and for other purposes", approved August 3, 1968 (Public Law 90-454; 82 Stat. 625; 16 U.S.C. 1221 et seq.) is amended as follows:

(1) by inserting immediately after the enacting clause the following:

"TITLE I"

(2) the first sentence of the first section of such Act is amended by striking out "That" and inserting in lieu thereof "SECTION 101."

(3) sections 2 through 6 of such Act are renumbered as sections 102 through 106, respectively, including all references thereto.

(4) by striking out "this Act" each place it appears and inserting in lieu thereof at each such place "this title".

(5) by adding at the end thereof the following new title:

"TITLE II

"SEC. 201. As used in this title the term—

"(1) 'Secretary' means the Secretary of the Interior.

"(2) 'Sea' includes the Atlantic, Pacific, and Arctic Oceans, the Gulf of Mexico, and the Caribbean and Bering Seas, and the Great Lakes.

"(3) 'Beach' is the area along the shore of the sea affected by wave action directly from the open sea. It is more precisely defined in the situations and under the conditions hereinafter set forth as follows:

"(A) In the case of typically sandy or shell beach with a discernible vegetation line which is constant or intermittent, it is that area which lies seaward from the line of vegetation to the sea.

"(B) In the case of a beach having no discernible vegetation line, the beach shall include all area formed by wave action not to exceed two hundred feet in width (measured inland from the point of mean higher high tide).

"(4) The 'line of vegetation' is the extreme seaward boundary of natural vegetation which typically spreads continuously inland. It includes the line of vegetation on the seaward side of dunes or mounds of sand typically formed along the line of highest wave action, and, where such a line is clearly defined, the same shall constitute the 'line of vegetation'. In any area where there is no clearly marked vegetation line, recourse shall be had to the nearest clearly marked line of vegetation on each side of such area to determine the elevation reached by the highest waves. The 'line of vegetation' for the unmarked area shall be the line of constant elevation connecting the two clearly marked lines of vegetation on each side. In the event the elevation of the two points on each side of the area are not the same, then the extension defining the line reached by the highest wave shall be the average elevation between the two points. Such line shall be connected at each of its termini at the point where it begins to parallel the true vegetation line by a line connecting it with the true vegetation line at its farthest extent. Such line shall not be affected by occasional sprigs of grass seaward from the dunes and shall not be affected by artificial fill, the addition or removal of turf, or by other artificial seaward from the dunes and shall not be affected by artificial changes in the natural vegetation of the area. Where such changes have been made, and thus the vegetation line has been obliterated or has been created artificially, the line of vegetation shall be reconstructed as it originally existed, if such is practicable; otherwise, it shall be determined in the same manner as in other areas where there is no clearly marked 'line of vegetation,' as in paragraph (3)(B) of this section.

"(5) 'Area caused by wave action' means the area to the point affected by the highest wave of the sea not a storm wave. It may include scattered stones washed by the sea.

"(6) 'Public beaches' are those which, under the provisions of this title, may be protected for use as a common.

"(7) 'Matching funds', as provided by a State, include funds for things of value which may be made available to the State for the purpose of matching the funds provided by the Federal Government for purchasing beach easements as, for instance, areas adjacent to beaches donated by individuals or associations for the purpose of parking. The value of such lands or other things used for matching Federal funds shall be determined by the Secretary. State matching funds shall not include any moneys which have been supplied through Federal grants.

"(8) 'Shore of the sea' includes those shores on the North American continent, or land adjacent thereto, the State of Hawaii, free commonwealths, unincorporated territories, and trust territories of the United States.

"SEC. 202. By reason of their traditional use as a thoroughfare and haven for fishermen and sea venturers, the necessity for them to be free and open in connection with shipping, navigation, salvage, and rescue operations, as well as recreation, Congress declares and affirms that the beaches of the United States are impressed with a national interest and that the public shall have free and unrestricted right to use them as a common to the full extent that such public right may be extended consistent with such property rights of littoral landowners as may be protected absolutely by the Constitution. It is the declared intention of Congress to exercise the full reach of its constitutional power over the subject.

"SEC. 203. No person shall create, erect, maintain, or construct any obstruction, barrier, or restraint of any nature which interferes with the free and unrestricted right of the public, individually and collectively, to enter, leave, cross, or use as a common the public beaches.

"SEC. 204. (a) An action shall be cognizable in the district courts of the United States without reference to jurisdictional amount, at the instance of the Attorney General or a United States district attorney to:

"(1) establish and protect the public right to beaches,

"(2) determine the existing status of title, ownership, and control, and

"(3) condemn such easements as may reasonably be necessary to accomplish the purposes of this title.

"(b) Actions brought under the authority of this section may be for injunctive, declaratory, or other suitable relief.

"SEC. 205. The following rules, applicable to considering the evidence shall be applicable in all cases brought under section 204 of this title:

"(1) a showing that the area is a beach shall be prima facie evidence that the title of the littoral owner does not include the right to prevent the public from using the area as a common;

"(2) a showing that the area is a beach shall be prima facie evidence that there has been imposed upon the beach a prescriptive right to use it as a common.

"SEC. 206. (a) Nothing in this title shall be held to impair, interfere, or prevent the States—

"(1) ownership of its lands and domains,

"(2) control of the public beaches in behalf of the public for the protection of the common usage or incidental to the enjoyment thereof, or

"(3) authority to perform State public services, including enactment of reasonable zones for wildlife, marine, and estuarine protection.

"(b) All interests in land recovered under authority of this title shall be treated as subject to the ownership, control, and authority of the State in the same measure as if the State itself had acted to recover such interest. In order that such interest be recovered through condemnation, the State must participate in acquiring such interest by providing matching funds of not less than 25 per centum of the value of the land condemned.

"SEC. 207. In order further to carry out the purposes of this title, it is desirable that the States and the Federal Government act in a joint partnership to protect the rights and interests of the people in the use of the beaches. The Secretary shall administer the terms and provisions of this title and shall determine what actions shall be brought under section 204 thereof.

"SEC. 208. The Secretary shall place at the disposal of the States such research facilities as may be reasonably available from the Federal Government, and, in cooperation with the other Federal agencies, such other information and facilities as may be reasonably available for assisting the States in carrying out the purposes of this title. The President may promulgate regulations governing the work of such interagency cooperation.

"SEC. 209. The Secretary is authorized to make grants to States for carrying out the purposes of this title. Such a grant shall not exceed 75 per centum of the cost of planning, acquisition, or development of projects designed to secure the right of the public to beaches where the State has complied with this title and where adequate State laws are established, in the judgment of the Secretary, to protect the public's right in the beaches.

"SEC. 210. The Secretary of Transportation is authorized to provide financial assistance to any State, and to its political subdivisions for the development and maintenance of transportation facilities necessary in connection with the use of public beaches in such State if, in the judgment of the Secretary, such State has defined and sufficiently protected public beaches within its boundaries by State law. Such financial assistance shall be for projects which shall include, but not be limited to, construction of necessary highways and roads to give access to the shoreline area, the construction of parking lots and adjacent park areas, as well as related transportation facilities. All sums appropriated to carry out title 23 of the United States Code are authorized to be made available to carry out this section."

EXECUTIVE OFFICE OF THE PRESIDENT,
COUNCIL ON ENVIRONMENTAL QUALITY,
Washington, D.C., October 23, 1973.

HON. LEONOR K. SULLIVAN,
Chairman, Committee on Merchant Marine and Fisheries, House of Representatives, Washington, D.C.

DEAR MADAM CHAIRMAN: Your Committee has requested the views of the Council on Environmental Quality on H.R. 10394, a bill "to establish a national policy with respect to the Nation's beach resources."

This bill has the following salient provisions:

(1) Section 202 declares that "the beaches of the United States are impressed with a national interest and that the public shall have free and

unrestricted right to use them as a common to the full extent that such public right may be extended consistent with such property rights of littoral landowners as may be protected absolutely by the Constitution." Section 201(3) defines "beach" as "the area along the shore of the sea affected by wave action directly from the open sea" including "that area seaward from the line of vegetation to the sea" or where there is no discernible vegetation line up to 200 feet inland from the point of "mean higher" high tide.

(ii) Section 203 provides that no person may erect any barrier restricting public access to "the public beaches." Under Section 201(6) "public beaches" are those which "under the provisions of this title" may be protected for use as a common.

(iii) Section 204 authorizes suits by the Attorney General or U.S. attorneys to (1) establish and protect the public right to beaches, (2) resolve questions of title, ownership and control, and (3) condemn such easements as are necessary to accomplish the purposes of the Act. Section 205 provides that in such cases "(1) a showing that the area is a beach shall be prima facie evidence that the title of the littoral owner does not include the right to prevent the public from using the area as a common;" and "(2) a showing that the area is a beach shall be prima facie evidence that there has been imposed upon the beach a prescriptive right to use it as a common."

(iv) All interests in land recovered by legal actions under Section 204 accrue to the State involved.

(v) The Secretary of the Interior is to furnish research assistance to the States and administer a grant-in-aid program (75% Federal share) to plan, acquire and develop public beach projects.

(vi) The Secretary of Transportation is authorized to provide financial assistance for transportation projects in connection with public beaches.

In the course of the Council's own development of national land use policy legislation (Land Use Policy and Planning Assistance Act of 1973, H.R. 4862) considerable attention was given to the desirability of strengthening State programs related to beaches and coastal wetlands. The Council expects a similar emphasis will be given to State beach programs under the Coastal Zone Management Act. The Council helped prepare legislation to use the tax code to discourage wetlands development (The Environmental Protection Tax Act of 1973, H.R. 5584) and encouraged the Corps of Engineers in developing their proposed revision of their dredge and fill regulations (May 10, 1973, 38 *Fed. Register*, 12217–12230) to build in more environmentally oriented considerations responsive to NEPA which would, *inter alia*, further beach protection. The Council supports the Interior Department's acquisition of national seashores and use of the Land and Water Conservation Fund for State beach acquisition.

The proposed bill draws on Texas open beaches legislation and other developments in State law (See Eckhardt, "A National Policy on Public Use of the Beaches" 24 *Syracuse Law Review* 967 (1973)). The important developments that have recently taken place in beach access legislation and court decisions are matters of State law and judicial decision. See "Public Rights and the Nation's Shoreline", 2 ELR 10184 (1972). The Council is not aware of anything in these developments that would make declarations of policy or court jurisdiction on matters of "dry beach" access an issue for Federal legislation (H.R. 10394 defines "beach" to extend past the high water mark to the dry sand beach extending to the vegetation line or several hundred feet inland.) Existing court decisions delimiting Federal jurisdiction on the basis of the "navigation servitude" over beaches appear to stop at the high water mark and do not include the dry sand beach. The National Water Commission in its report "Water Policies for the Future" filed with the President this past June took the view that access to beaches (other than beaches on Federal lands) is properly a matter for State law: "Public recreational rights in waters and shorelands are largely dependent upon the initiative and aggressiveness of the States. State legislation cannot diminish either Federal or private ownership interests, but in areas clouded with uncertainty, the courts have shown an inclination to be persuaded by State statutes declaring public access rights." (p. 276)

Just as Federal programs to prevent beach erosion can be conditioned on public access, other Federal programs making grants to the States affecting beaches under the Coastal Zone Management Act, Land and Water Conserva-

tion Fund or the Highway Program can be similarly oriented. It is not clear, however, that this is not already possible under existing legislation.

We concur with the position of the Department of the Interior that no comprehensive program for the protection of our Nation's beaches, and to assure their availability for recreational and other uses, will succeed without close cooperation between coastal States and the Federal Government. The Council is seeking to foster this cooperation. In our view the provisions of H.R. 10394 are either unnecessary or undesirable for the effective working of this cooperation. For this reason the Council cannot support the bill.

We hope very much that the Committee will invite testimony from representatives of coastal States.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

JOHN BUSTERUD,
Acting Chairman.

DEPARTMENT OF THE ARMY,
Washington, D.C., October 31, 1973.

Hon. LEONOR K. SULLIVAN,
Chairman, Committee on Merchant Marine and Fisheries, House of Representatives.

DEAR MADAM CHAIRMAN: This is in reply to your request for the views of the Secretary of Defense on H.R. 4932, 93d Congress, a bill "To amend the Act of August 3, 1968, relating to the Nation's estuaries and their natural resources, to establish a national policy with respect to the Nation's beach resources." The Department of the Army has been assigned responsibility for expressing its views on this bill. These views are also applicable to H.R. 10394, 93d Congress, a similar bill dealing with the same subject matter.

The Act of August 3, 1968 authorizes the Secretary of the Interior, cooperating with the States, to conduct an inventory and study of the Nation's estuaries and their natural resources. The purpose of H.R. 4932 and H.R. 10394 is to add an additional title expressing a national interest assuring that the public shall have free and unrestricted rights of access and use of the Nation's beaches consistent with the property rights of littoral landowners. In accordance with this policy, the bills would prohibit any person from interfering with the public's right of access and use of public beaches, and it would also authorize United States attorneys to bring legal actions to determine the extent of the public's right of access and use of such beaches to protect those rights.

H.R. 4932 and H.R. 10394 would also affirm the rights of the States to maintain jurisdiction and control over those beaches lying within their territorial jurisdiction as well as provide for the dual ownership—Federal and State—of all interests in lands acquired by the Federal Government under the authority of these bills. The Federal Government, acting in joint partnership with the States, is also authorized to protect the public's right to use public beaches.

The Secretary of Transportation under H.R. 4932 or The Secretary of the Interior under H.R. 10394 is authorized to administer the provisions of these bills. Depending upon which bill is enacted into law, the administering Secretary would be authorized to make grants, covering up to 75 per cent of the costs to the States of planning, acquisition, and development of the projects designed to secure public rights to the use of the beach in those cases where the State has complied with the provisions of the bills and has enacted adequate laws protecting the public's rights in the beaches. In either bill the Secretary of Transportation would be authorized to provide financial assistance for the development and maintenance of transportation facilities necessary in connection with the use of public beaches. The bills would also authorize all Federal agencies to provide research facilities and information, under regulations promulgated by the President, to assist the States in carrying out the provisions of the bills.

These bills contain a number of shortcomings which would require further consideration.

First. Section 202 of H.R. 4932 and H.R. 10394 seems to make the implicit assumption that unlimited, public access to and use of all beaches and shores is the best use of these areas, and accordingly they fail to recognize other competing and valid uses, such as the preservation of areas for fish and wildlife habitat or for scenic and historical values. The Department of the Army believes that the policy declaration found in Section 202 fails to recognize the congressional policies developed and promulgated in the Coastal Zone Management Act of 1972 (Public Law 92-583), which includes the policy "to encourage and assist states to exercise effectively their responsibilities in the coastal zone through development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone giving full consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development." The Department of the Army recommends that further consideration of these other values should be promoted in the development of plans for the preservation and protection of the Nation's beach areas.

Second, the two bills differ with respect to the designation of a Federal agency to administer their provisions, and to bring actions to establish and protect the public's right of access and use of the beaches. The Department of the Army believes that either the Secretary of the Interior, as provided for in H.R. 10394, or the Secretary of Commerce, who has the responsibility for administering the provisions of the Coastal Zone Management Act, should be considered for administering the policies regarding the utilization and protection of the Naton's beaches resources.

Third, Section 203 of the bills prohibits any person from creating, erecting, maintaining or constructing any obstruction, barrier, or restaint of any nature which interferes with the free and unrestricted right of the public to enter, leave, cross, or use as a common the public beaches. However, the bills fail to define "person" as utilized in this section. Thus, the legal effect of Section 203 on the activities of the Federal Government or State or local governments or officers, agents, or representatives thereof, which would include, for example, the construction activities of the Corps of Engineers pursuant to federally authorized projects for beach and shore protection, is not clear and accordingly, should be more carefully delineated.

Finally, the purpose, as expressed in these bills, is to insure that the public has unrestricted access to and use of the beaches along the coast of the United States, its territories and possessions, and the Great Lakes, subject to the rights of the littoral landowners and to the ownership and control exercised by the coastal States. However, the extent and nature of such public rights is not clearly defined, nor are the rights of the States to exercise jurisdiction in these areas clearly delineated. The Department of the Army believes that the rights and responsibilities of the public, landowners, and governmental institutions should be further studied and more closely delineated within the legislation establishing the rights of the public to the free and unrestricted use of the Nation's beaches.

For these reasons, the Department of the Army does not favor enactment of these bills in their present form.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

(S) HOWARD H. CALLAWAY,
Secretary of the Army.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., October 24, 1973.

Hon. LEONOR K. SULLIVAN,
Chairman, Committee on Merchant Marine and Fisheries, House of Representatives, Washington, D.C.

DEAR MADAM CHAIRMAN: Your Committee has requested the views of this Department on H.R. 10394, a bill "To amend the Act of August 3, 1968, relating to the Nation's estuaries and their natural resources, to establish a national policy with respect to the Nation's beach resources," which we understand supercedes a similar bill, H.R. 4932.

While we understand the proponents' concern for public access to the Nation's beaches, we do not agree with some of the assumptions on which the bill is based and are concerned that its enactment will complicate the problems that surround use, ownership, and management of that land mass which lies "seaward from the line of vegetation to the sea." Accordingly, we recommend against the enactment of H.R. 10394.

H.R. 10394 is intended to provide the public with free and unrestricted access to and use of the Nation's beaches along the Atlantic, Pacific and Arctic Oceans, the Gulf of Mexico, the Caribbean and Bering Seas, and the Great Lakes. Its objective would be accomplished by actions brought by the Attorney General of the United States or a United States District Attorney in Federal district courts to establish that the public has a prescriptive right to the use of the beaches as a common. In cases where such rights could be established the bill authorizes the condemnation of such easements as may reasonably be necessary to accomplish its objective. The Secretary of the Interior would determine whether enforcement or condemnation proceedings should be instituted. A State must participate in any condemnation proceedings by providing not less than 25 percent of the value of the land condemned. All land so condemned would become property of the State involved.

In addition, the bill would authorize the Secretary to provide financial assistance to State and local governments for the development and maintenance of transportation facilities, including access highways and parking areas, necessary for use of public beaches. H.R. 10394 would also provide for the purchase, from private landowners of beach rights-of-way or easements, through condemnation if necessary, with Federal financial assistance up to 75 percent of the acquisition cost, and prohibit the construction of barriers, fences or other restraints which interfere with the free and unrestricted right of the public to enter, leave, cross, or use as a common the public beaches.

Section 202 of H.R. 10394 would have Congress declare that the beaches of the United States are impressed with a national interest, and that such interest implies a public right to free access. To the extent that certain environmental values can be ascribed to any area, it may be appropriate to affirm the existence of a national interest. But we question whether it is possible or even desirable to state that this interest is best served by the development of means to assure public access. It is the concommitant of so broad a statement that every beach in the United States is susceptible to unlimited public entry, and that each is best suited to such use. We cannot agree with this assumption. Section 206(a)(3) of the bill itself contains partial recognition, at least, of the fact that a national interest in the preservation of wildlife, for instance may not be compatible with an unrestricted right of public access. Nor is it at all clear that the population would value access to every beach knowing that some are better suited to recreational use than others.

Although Section 207 provides that the Secretary shall determine which actions will be brought to protect the public right, and thus to make more accessible a given beach, it does not suggest any criteria by which he would be guided. Although it is seen as "desirable" that the States and the Federal Government act in a joint partnership", the role of the States is not well defined. An easement or other interest obtained in the Federal courts by means of an action initiated by the Secretary would accrue to the State. If condemnation proceedings are required, the State would be compelled to make a contribution without necessarily having approved the Secretary's course of action. No mechanism is provided, other than the suggestion of a partnership, for the resolution of differences which could arise if the Secretary saw a national interest in the acquisition of certain interests that was not as readily apparent to State authorities.

We are concerned, too, about the assumption that States will be able to exercise their newly acquired "ownership, control, and authority" in a way that is compatible with the national interest impressed by this Act upon the beaches. Notwithstanding its substantial contribution toward the cost of acquisition the Federal Government would be specifically precluded by section 206(a)(2) from taking any action that would "impair, interfere or prevent the States . . . control of the public beaches in behalf of the public for the protection of the common usage or incidental to the enjoyment there . . .". A State, once having acquired control, would be free to manage

the public beaches as it saw fit, so long as its management was conducive to "protection of the common usage" or was "incidental to the enjoyment" of the beaches. To protect the "common usage" is not necessarily to protect the environmental values whose threatened loss prompted the introduction of this legislation. It is not difficult to conceive of a situation where, public access having been assured, a State would find itself without the capability to manage effectively a more intensive use.

We recognize that no comprehensive program for the protection of our Nation's beaches, and the assurance of their availability for recreational and other uses, will succeed without close cooperation between coastal States and the Federal Government. As a consequence of its responsibility for the conservation of the Nation's natural resources, this Department has acquired and now manages for public enjoyment beach and seashore areas of special significance. These include beaches designated as National Seashores at Cape Cod, Massachusetts; Fire Island, New York; Assateque Island, Maryland-Virginia; Cape Hatteras and Cape Lookout, North Carolina; Padre Island, Texas; and Point Reyes, California. Also administered by the National Park Service of this Department, are Lakeshores at Indiana Dunes on Lake Michigan and Pictured Rocks on Lake Superior in Michigan. Sea beaches are an integral part of several National Wildlife Refuges administered by the Department through its Bureau of Sport Fisheries and Wildlife. Coastal States and political subdivisions thereof have likewise made use of available resources to acquire beach areas susceptible to recreational and other uses by great numbers of their citizens.

We believe the objective of H.R. 10394 can be accomplished under current authority provided in the Coastal Zone Management Act of 1972 (P.L. 92-583). Through effective management and efficacious use of their land-use regulatory authority as contemplated in that Act, the States will be able to provide protection against further encroachment and to meet the need for preservation of our Nation's beaches as part of the comprehensive land use planning processes for the coastal zone. To that end the Coastal Zone Management Act (1) is addressed to the national interest in effective management of our entire coastal zone (2) recognizes the existence of competing uses, and provides a means for their accommodation; (3) provides an explicit mechanism for a productive partnership between coastal States and the Federal Government; and (4) seeks to assure proper management by the States of their estuarine and coastal resources, through development and implementation of a program in which the Federal Government concurs. We believe this is a feasible approach, more likely to be successful in a shorter period of time than the costly process of litigation and compensation proposed in H.R. 10394.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

NATHANIEL P. REED,
Secretary of the Interior.

DEPARTMENT OF JUSTICE,
Washington, D.C., October 25, 1973.

Hon. LEONOR K. SULLIVAN,
Chairman, House Committee on Merchant Marine and Fisheries,
House of Representatives, Washington, D.C.

DEAR MADAM CHAIRMAN: This is in response to your request for the views of the Department of Justice on H.R. 10394 and H.R. 4932, bills both entitled "To amend the Act of August 3, 1968, relating to the Nation's estuaries and their natural resources, to establish a national policy with respect to the Nation's beach resources."

The two bills are identical except that administration of federal functions thereunder would be placed by H.R. 10394 in the Secretary of the Interior, and by H.R. 4932 in the Secretary of the Department in which the Coast Guard is operating, acting through the Commandant of the Coast Guard, by definition of "Secretary" in Section 201(1) of each bill. The purpose of these bills is to establish by adjudication or by acquisition, a public right to use all beaches on the Atlantic, Pacific and Arctic Oceans, the Gulf of Mexico,

and the Caribbean and Bering Seas, and the Great Lakes and to prevent any interference with public access thereto.

At common law, private titles along the sea normally ran to the mean high-water line, while tidelands (foreshore) between the high and low-water lines belonged to the sovereign. *Rex* v. *Lord Yarborough*, 2 Blight N.S. 147, 4 Eng.Rep. 1087 (H.L. 1828). In the United States, generally, the tidelands belonged to the states and the lands above the mean high-water line belong either to the United States as public or reserved lands or to its patentees or other private owners. See *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10 (1935); *United States* v. *California*, 322 U.S. 19 (1947); *Hughes* v. *Washington*, 389 U.S. 290 (1967). The rule differs where private titles running further seaward had vested under the law of a prior sovereign before American sovereignty, or where states have relinquished some of their rights to upland owners. For example, Maine and Massachusetts apparently have relinquished to the littoral owner the title as far as the low-water line. See *Richard T. Green* v. *City of Chelsea*, 149 F.2d 927, 931 (C.A. 1, 1945), cert. den., 326 U.S. 741. Littoral land above the mean high-water line is generally not open to the public except where it has been made so by the act of the littoral owner, be it the United States, a state or local government, or a private owner.

The bills deal with "beaches", defined by section 201 as the sandy area extending inland form the sea to the line of vegetation or, where there is no line of vegetation, the area affected by wave action, extending not over 200 feet from the mean higher high-water line. Section 202 declares that the beaches of the United States are impressed with a national interest and an intention to protect the free and unrestricted right of the puplic to use them as common to the full extent that such public right may be extended consistent with such property rights of littoral landowners as may be protected absolutely by the Constitution.

We cannot agree that the public has a free and unrestricted right to use the entire area the bill defines as beach as a common. Generally speaking, owners of littoral land do have the right to enclose it seaward as far as the line of mean high water even where there has been substantial public use. E.g., *Coburn* v. *San Mateo County*, 75 Fed. 520 (N.D. Cal. 1896). While the bills indicate the declared intention of Congress to exercise the full reach of its constitutional power to affirm that beaches are impressed with a national interest and to afford the public a free and unrestricted right to use them, it is by no means clears that above the high-water line, Congress has any power at all over the subject matter. Moreover, there is one common law authority which questions the right of the public to use the area below the high-water line. *Blundell* v. *Catterall*, 5 Barn. & Ald. 268 (K.B. 1821).

Section 201(5) would define "area caused by wave action" as used in Section 201(3). In that section the terms used are "area affected by wave action" (page 3, lines 8-9). The proposed definition, "the area to the point affected by the highest wave of the sea not a storm wave," would open the way to almost endless controversy. Lines of various mean tidal stages can be established with great precision by surveying lines along the shore at uniform elevations determined by averaging tidal observations over a period of 18.6 years. However, to determine what waves are not "storm waves" and how far such waves have ever reached inland would involve difficult semantic, meteorological, and factual issues and maintenance of constant observations at every point along every coast, with a shift of boundary when ever a wave not a storm wave was seen to reach farther inland than such a wave had previously been known to reach at that point.

As written Section 203 could be interpreted to forbid erecting anything at all not only on the beaches but also on any land between the beaches and the nearest public highway. As a regulation the prohibition could not be considered reasonable. As a taking of all substantial value of all lands between all beaches and the nearest highways the costs would be prohibitive. Consequently, we suggest that Section 203 be modified to limit the prohibition to the erection of anything that would prevent all access of the public to an area which it has a free and unrestricted right to use as a common.

Section 204 would give the district courts jurisdiction, without reference to jurisdictional amount, of actions by the Attorney General or United States district attorneys for injunctive, declaratory, or other relief to establish and protect the public right to beaches, determine the existing title, and condemn

such easements as might be reasonably necessary to accomplish the purposes of the Act. Sections 206(b) would provide that all interests in land, recovered under the Act, should be treated as subject to state ownership and control as if the state had acted to recover them, but that no interests should be recovered through condemnation unless the state participated by providing at least 25 per cent of the value of the land condemned.

There is no doubt of the propriety of federal condemnation suits to acquire property for federal purposes, and those purposes can be effectuated by giving title to some third party. However, we feel serious doubt as to the propriety of suits by the United States to quiet the states' title or otherwise protect interests that the public may have acquired in privately owned littoral property, where no federal rights are involved. The United States cannot bring actions in which it has no interest. *Gartner v. United States*, 149 U.S. 662 (1893). It may sue as *parens patriae* to protect federal rights of its citizens, *United States v. Mississippi*, 380 U.S. 128, 138 (1965), but any public right in littoral land here involved must have been acquired by state law, and the State would be the appropriate *parens patriae*. Cf. *Minnesota ex rel. Lord v. Benson*, 274 F.2d 764 (C.A. D.C. 1960). It seems doubtful that suits by the United States to quiet title in the states to public rights prescriptively acquired in private property under state law would be cases of controversies within the constitutional power of the federal judiciary.

Section 205 would provide that in actions brought under the Act, the fact that an area is a beach should be prima facie evidence that a prescriptive right of use as a common has been impressed on it and that the owner has no right to prevent such use. Statutory presumptions are valid only when justified by common experience. "Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property." *Manley v. Georgia*, 279 U.S. 1, 6 (1929). Accord, *Western & Atlantic R. Co. v. Henderson*, 279 U.S. 639, 642 (1929). While legal and factual justification for presuming public easement upon the foreshore is established, we are not aware of similar justification for presuming that all private titles to littoral land above the high-water mark have been subjected to prescriptive public easements. A similar presumption is included in section 2 of the Texas "Open Beaches" Act of 1959, Art. 5415d, Vernon's Texas Statutes Annotated, but in sustaining the constitutionality of other provisions of that Act, the Texas Court of Civil Appeals pointedly refrained from considering the constitutionality of the presumption. *Seaway Co. v. Attorney General*, 375 S.W.2d 923 (Tex. Civ.App. 1964).

Section 207 would declare it to be desirable for the states and Federal Government to "act in a joint partnership" to protect the rights of the people in the use of the beaches. While that language may be intended only symbolically, it could result in subjecting the United States to an unlimited liability for state actions.

The second sentence of section 207 provides: "The Secretary shall administer the terms and provisions of this Act and shall determine what actions shall be brought under section 204 hereof." The decision as to whether a particular action should be brought involves considerations of litigation policy that can be properly evaluated only by the Department charged with the conduct of government litigation. Such decisions should be left with the Attorney General, as in other cases.

Section 208 would direct the "Secretary" to place at state disposal federal research facilities reasonably available and, in cooperation with other federal agencies, historical, geodetic, and other information and facilities reasonably available. It would authorize the President to promulgate applicable regulations.

This provision is objectionable in several respects. It is broad enough to cover research facilities of all kinds, including legal research, and might be understood to give the Secretary the authority to decide what facilities are "reasonably available" in Departments other than his own. In addition, this language could result in vexatious litigation in mandamus to review decisions as to what is "reasonably available." The United States is now engaged in litigation with nineteen of the twenty-two coastal states over closely related matters of coastline determination, and must be allowed to decide for itself how far its facilities in that field can be made available to the states without undue prejudice to the federal litigation interest.

Section 209 authorizes the Secretary to grant to the states up to 75 per cent of the cost of planning, acquisition or development of projects designed to secure the right of the public to beaches. For the funds to make the grant the Secretary must rely upon the appropriation of funds authorized by the Act of August 3, 1968, relating to the Nation's estuaries. 16 U.S.C. 1221 *et seq.* That Act authorized the appropriation of $250,000 in 1969 and $250,000 in 1970. The grants these bills propose to make to the states could easily exhaust the entire appropriation leaving nothing at all for the other purposes of the Act.

Section 210 would authorize the Secretary of Transportation to give financial assistance to states or their subdivisions to establish or maintain beach-related transportation facilities, including parking lots and adjacent parks, if he found that state law defined and sufficiently protected public beaches. It would authorize appropriation for this purpose of all sums appropriated to carry out Title 23 of the United States Code. We consider the latter provision highly undesirable as a matter of budgetary procedure. It would mean that every appropriation for any purpose under Title 23 would automatically be an authorization to appropriate the same money for the purposes of section 210, which of course would defeat the purpose for which it was originally authorized and appropriated.

The Department of Justice recommends against enactment of this legislation.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

PATRICK M. MCSWEENEY,
Deputy Assistant Attorney General.

DEPARTMENT OF STATE,
Washington, D.C., October 24, 1973.

Hon. LEONOR K. SULLIVAN,
Chairman, Committee on Merchant Marine and Fisheries,
House of Representatives,
Washington, D.C.

DEAR MADAM CHAIRMAN: In your communication of September 25, 1973 you forwarded for the Department's comments legislation entitled H.R. 10394, a bill "To amend the Act of August 3, 1968, relating to the Nation's estuaries and their natural resources, to establish a national policy with respect to the Nation's beach resources."

After reviewing the provisions of H.R. 10394, we have concluded that no foreign policy implications are contemplated therein. Consequently, the Department of State has no comments to offer upon this bill.

The Office of Management and Budget advises from the standpoint of the Administration's program there is no objection to the submission of this report.

Sincerely,

MARSHALL WRIGHT,
Assistant Secretary for Congressional Relations.

OFFICE OF THE SECRETARY OF TRANSPORTATION,
Washington, D.C., November 5, 1973.

Hon. LEONOR K. SULLIVAN,
Chairman, Committee on Merchant Marine and Fisheries, House of Representatives, Washington, D.C.

DEAR MADAM CHAIRMAN: Reference is made to your request for the comments of this Department concerning H.R. 10394, a bill "To amend the Act of August 3, 1968, relating to the Nation's estuaries and their natural resources, to establish a national policy with respect to the Nation's beach resources."

P.L. 90-454 authorized the Secretary of Interior, in cooperation with the States, to establish a national policy with respect to the Naion's beaches and estuaries. The proposed legislation would add a second title to the law. By

the passage of H.R. 10394, Congress would declare that the beaches of the United States are impressed with a national interest, and that the public has a free and unrestricted right to use them to the maximum extent possible, taking into consideration the Constitutional protection afforded property rights. The bill would prohibit the creation, erection, maintenance, or construction of any obstruction, barrier, or restraint which interferes with the free and unrestricted right of access to public beaches. It would provide for a program of Federal aid to the States for research facilities, grants, and financial assistance in order to establish a system of protected beaches. The bill would be administered by the Secretary of the Interior. Transportation facilities related to beach development would be financed under section 210 of the bill which provides: "All sums appropriated to carry out title 23 of the United States Code [the title dealing with highways] are authorized to be made available to carry out this section."

The bill, H.R. 10394, supersedes an earlier bill, H.R. 4932, which was identical but for the fact that the earlier bill was to be administered by the Secretary of the department in which the Coast Guard is operating.

The Coast Guard's involvement in the planning, management, or administration of beaches has been of a limited and indirect nature. At least three agencies, the Departments of Interior and Commerce and the Corps of Engineers, have more expertise with regard thereto.

Under P.L. 94-454, the statute being amended, the Department of Interior was directed to undertake a National Estuaries Study. Additionally, the Secretary of Interior was given the authority to establish, with the States, programs for the "permanent management, development, and administration of any area, land, or interests within the estuary and adjacent lands which are owned or thereafter acquired by a State or political subdivision . . . upon completion of that study. The Department of Interior's National Estuaries Study has been completed. Further, under the Coastal Zone Management Act of 1972 (P.L. 92-583), the Secretary of Commerce has broad authority to plan and manage a national coastal zone protection and development program. Finally, the Army Corps of Engineers, which has traditionally been concerned with obstructions to, and conservation of beaches, has recently completed a comprehensive National Shoreline Study aimed at improving national policy toward beaches and other coastal conservation.

Finally, we note that sections 208 and 209 seem to be inconsistent with, or at least to duplicate, sections 3, 4, and 5 of the present statute. Also, the funding arrangement under section 210, which entails use of the funds appropriated for highways for the improvement of the transportation facilities surrounding national beach areas, is vague and ill-defined.

The Department of Transportation does not support enactment of either H.R. 4932 or H.R. 10394.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the submission of this report for the consideration of the Committee.

Sincerely,

J. THOMAS TIDD,
Acting General Counsel.

Mr. ECKHARDT. One of those States that has the problem most in the forefront of its concern, and the State that perhaps has more shoreline than any other than the State of Alaska is the State of Florida.

We are most pleased today to have several members of the Florida Delegation. I will call Representative Sam Gibbons to be our first witness.

STATEMENT OF HON. SAM M. GIBBONS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. GIBBONS. Mr. Chairman, I would like to commend you personally for your leadership and your devotion to this pending legislation.

I recall that you first spoke of this matter some 3 or 4 years ago. I have been privileged to join you in the introduction of a series of bills during that time, seeking to provide access and acquisition of public beaches.

As you know, Mr. Chairman, you and I have discussed this as a right that belongs to the American people as one of our great traditions, but it is a right that is being diminished by the encroachment of private landowners on what has been traditionally the public domain.

Congressman Gunther and I are here this morning to speak about the need for acquiring and protecting public beaches, and access to beaches in our areas. In Mr. Gunter's district are some of the most beautiful beaches in the world, some of which are accessible to the public, and some of which are not.

My area does not border on the Gulf of Mexico, but the half million people who comprise my congressional district spend a great deal of their time commuting just a few miles to the beaches, and enjoying those beaches. We also, of course, have visitors from all over the Nation who come to Florida at different times of the year—traditionally in the wintertime, but for many years now, in both the winter and the summer. For those people, and for many of my own constituents to enjoy the beaches it is necessary for them to rent an expensive motel or hotel room, or to go to some crowded guesthouse someplace along these miles of beautiful public beaches that are in Florida.

Now, I am not complaining personally. By reason of luck and fortuitious circumstances, I am one of those owners of property who has access to the beach. It has never been any personal problem to me. Having lived for 53 years in Florida, I know that many people are denied access to the beaches because they do not want to be accused of trespassing—do not want to go through harassment in order to get to those beaches. Each year I have watched the public use of these beaches erode.

I think every man, woman, and child in this country ought to have the right to walk down to a beach, to pick up a shell, to go swimming, to fish, to relax and enjoy those God-given beauties that exist around the country's shorelines.

As you pointed out in your opening statement, Mr. Chairman, if you look at a map you think there are a lot of beaches. There is a lot of coastline, but unfortunately, there are not a lot of beaches. Sometimes coastlines are so rugged and so inaccessible, or so marshy, or the waves in the water just do not make for the right proportion to produce beaches, that the illusion of there being a lot of beaches in America is not supported in fact.

In flying around the country, you notice many beaches are just not accessible. They either do not exist, or they are not accessible. Your bill, Mr. Chairman, does a magnificent job in what, I think, is a most constructive and most conservative piece of legislation to provide access to these public beaches.

I hope that this subcommittee, and the whole committee, will give prompt and vigorous attention to this matter.

The chances of us providing healthy recreational enjoyment for our people are going to slip away if we do not acquire rights-of-way, and reacquire beaches for public use.

I know from my own observations that residential beachfront property is selling in the Tampa Bay area on the gulf for more than $1,000 a front foot, for a lot that is only perhaps 100, 150, or 200 feet deep. These prices are rapidly escalating. Something must be done to make sure that roads are opened up so that people can have access to the beach and parking areas should be provided, as your bill, Mr. Chairman, would do. Perhaps in the less accessible beach areas, some transportation should be provided so that we will not turn all of the beachfront property into a gigantic parking lot.

These are some of the things that must be done in this country.

We have a challenge, in the remainder of this century, to be able to govern in very peaceful and turbulent times. I regret to say that, as you look around the world, in a democracy such as ours, governments that are based upon the free will and consent of the governed are rapidly slipping out of existence.

We are reminded of this every day. One of the things that is going to help give us the strength of character, tranquility, and the things we need to do to govern ourselves wisely, is having healthful, wholesome recreation for all of our people. We need to be able to get away and find some time to be by ourselves, and to commune with God, and to think wholesome thoughts.

There is no better place in the world to do that than the beach with the physical invigoration that comes from swimming and walking, from being in the sun and the wind, from watching the birds, picking up shells, and from talking with other people. These are all things we need to do.

This is not just a romantic attachment that we have for the beaches. This is a fundamental American right, that is being, in many cases, deprived of its opportunity to be exercised, not by any vicious attack upon that right, but because the right is being frittered away by nonuse.

Those, Mr. Chairman, are my ideas about this bill. I think it is well drawn. It is conservatively programed, and I urge its rapid adoption by this committee and by the Congress.

Mr. Chairman and distinguished members of the Merchant Marine and Fisheries Committee, I appreciate this opportunity to testify on pending legislation to establish a national open beaches policy. Like many other environmental and land use problems before us today, the problem of dwindling access to beaches has been cast upon us as an undesirable by-product of a rapidly expanding economy. Since the 1920's, as population grew, leisure time increased, and desire for recreational activities multiplied, the beaches of our nation have experienced the coming of development of all kinds, even down to the water's edge. The increased affluence of Americans, who have come to enjoy the highest per capita income in the world, has set off a building boom along the shores which have driven coastal land values to incredible heights and which promises to make the Atlantic, Pacific and Gulf coastlines one vast strip development.

All of us who spend time on the beach have surely witnessed at one time or another the manifestations of the vacation industry that line our shores today. Miles and miles of motels, condominiums, vacation homes, hot dog stands, and other forms of urban sprawl now stand where there once was only an occasional beach house surrounded by sand dunes. So concentrated has this development become in some areas that many beach property owners, be they private individuals or corporate giants, have succeeded in fencing off, posting, and closing entry or passage over the land. Access by the public to the beaches themselves has become seriously inhibited and, in many cases, completely foreclosed.

The critical nature of the beach access problem is dramatically illustrated by the oft quoted, yet nevertheless valid, statistic that the 30 coastal and Great Lakes States contain more than 75 percent of the more than 200 million inhabitants of this country. This of course means that more than 150 million people are within a half day's drive, at the most, from a beach. Unfortunately, the growth trend in coastal States is still climbing and shows no sign of leveling off in the near future.

But overpopulation of coastal areas is only part of the problem. Restricted access to some beaches and severe erosion of others force millions of people onto relatively small strips of beach. The Corps of Engineers National Shoreline Study estimated that a beach less than one-half mile long may have hundreds of thousands of visitors each year. Annual attendance at the beaches of Long Island alone totals more than 70 million persons a year, and one area of the beach, Jones Beach State Park, has 13 million sunbathers a year, which averages out to about 6 million users per mile.

As you can see, present facilities are being used beyond a reasonable capacity in some areas of the nation, a condition that will continue to exist as long as we allow large portions of our shorelands to be closed off entirely or to be used only by those fortunate enough to own them.

In 1967, the Bureau of Outdoor Recreation published an inventory of shorelands which included some very alarming statistics. The report indicates that of the 59,157 miles of shoreline in the continental United States, only 1,209 miles, or approximately 2 percent, is in public ownership and potentially available for recreational use. Furthermore, almost half of this 1,209 miles is land controlled by the military and is therefore restricted to the public.

By contrast, the report shows that 19,934 miles or approximately 86 percent of the nation's 21,724 miles of recreational shoreline is in private ownership.

The Bureau of Outdoor Recreation study does not attempt to draw any conclusions concerning the right of the public to use privately owned beach lands, but it does state that "the total physical shoreline of the Nation can and should be considered available for public development use."

Many abuses of coastal areas will be rectified by the Coastal Zone Management Act. Enacted last year by Congress, this landmark legislation is intended to encourage the States to institute the necessary planning measures to stem the tide of abuse and neglect of our coastal resources that has become so commonplace in recent years. This is a much needed and essential Federal programs, but it only goes part way

in establishing a Federal policy for the coastal areas. Clean, well-planned shorelines mean little if only those who own title to them are allowed to use them. Therefore, there is a critical and legitimate need to complete Federal policy with regard to the use of coastal resources by firmly establishing that our beach resources should be available for the recreational use of all of our citizens regardless of ownership. This is what H.R. 4932, is designed to do.

H.R. 4932 would deal with the beach access problem in five ways:

First, it would encourage States to enact laws aimed at securing public access to all beaches. This would be accomplished through the creation of a system of Federal matching-fund grants to pay for up to 75 percent of the cost of planning, land acquisition, and development projects necessary to secure the maintenance of open beaches. However, prior to receiving any Federal funds, a State would be required to have enacted "adequate State laws" to protect public access to beaches. Eligibility for Federal grants would be determined by the Secretary of the department having jurisdiction over the Coast Guard.

Second, and perhaps more importantly, H.R. 4932 would declare a public right to access to the Nation's beaches. This would reaffirm the common law principle that the beach lands are trust lands, to be available for use of all citizens regardless of ownership.

Third, it would provide Federal court access to those who would seek to use legal means to remove beach barriers and fences.

Fourth, it would authorize financial assistance to the State for developing transportation facilities necessary for the public to reach generally inaccessible beaches.

Finally, it would prohibit the erection of any barrier or obstruction along the shore that would tend to restrict public use of the beach.

Mr. Chairman, this legislation is consistent with long established principles and traditions of common law that find their roots far back in the early English legal system, principles that have been affirmed more recently by the Submerged Lands Act of 1953. Despite the known and acknowledged fact that the State is the owner, holder in trust for the people, of all land from the water's edge to the high-water or vegetation line, more than 90 percent of our beach lands are inaccessible to the public today.

In my opinion Mr. Chairman, the beaches of this country are a part of the common heritage of all of the people, they are impressed with the public interest. It is the responsibility of Congress to protect this great resource and to make it available for the public use and enjoyment by the millions of Americans who depend upon the shores for their recreation.

As you well know, the concepts embodied in this proposal, H.R. 4932, are not new ones. My distinguished colleague, Mr. Eckhardt, first introduced this measure in May of 1969 and similar measures have been reintroduced in various forms for the past two Congresses. I have co-sponsored this legislation, as have many of my colleagues in the House, since it was first introduced and I am convinced that we must not delay its enactment any longer. We need this legislation and we need it desperately.

Protection and enhancement of the beaches is a continuing responsibility of the Federal Government where the public interest is in-

volved: but this responsibility has lapsed with regard to preserving the public right to recreational use of the beaches due to the encroachment of private ownership in the littoral area. Passage of H.R. 4932 will be of inestimable value in preserving this vital heritage for the present and future use of all Americans.

Mr. Chairman, H.R. 4932 has the support of the Governor of Florida. I would like to close my statement with the letter I received from the Honorable Reubin O'D. Askew to me dated September 11, 1973:

SEPTEMBER 11, 1973.

Hon. SAM M. GIBBONS, M.C.,
Seventh Florida District,
House Office Building, Washington, D.C.

DEAR SAM: Thank you for your letter of August 27 inviting me to comment on House Resolution 4932, the proposed National Open Beaches Act. It appears to me that the primary intent of this legislation is to insure for all time the public's right of access to and use of the ocean beaches of this country. This is a resource management need which we in Florida can readily appreciate as we observe the continuing rapid development of our coastal areas.

Traditionally, the principal means of preserving beach resources for public use has been through outright acquisition. In addition to reaffirming the inherent public interest in the beach as a "commons," the proposed act would lay the basis for an aggressive acquisition program and would make grants of 75 percent available to the States for this purpose. This dual approach to beach preservation would add welcome strength and momentum to the substantial programs already undertaken by the State of Florida.

In view of the timely importance of the objective and the provisions made to safeguard traditional private property rights, I am pleased to endorse H.R. 4932 as a reasonable and effective means of preserving the Nation's rapidly dwindling public beach resources. Thank you again for this opportunity to comment on this important legislation.

REUBEN O'D. ASKEW,
Governor, State of Florida.

Mr. GIBBONS. Thank you, Mr. Chairman. I will be glad to answer any questions you may have.

Mr. ECKHARDT. Certainly, thank you.

My distinguished colleague from Florida in his presentation has indicated that he is one of the coauthors of this legislation. His past participation in it has been most valuable in formulating this program.

Mr. GIBBONS. Thank you for your generosity, sir.

Mr. ECKHARDT. Thank you, Congressman Gibbons.

Also, coauthor of the bill is Congressman Bill Gunter, of Florida.

We are most glad to have you here this morning.

STATEMENT OF HON. BILL GUNTER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. GUNTER. Thank you, Mr. Chairman, very much, and I would ceratinly like to associate myself with the remarks of my distinguished colleague from Florida, Congressman Gibbons, in commending you for your leadership in the drafting and presentation of this legislation.

I recall that as a member of the Texas Legislature, you led to passage in that great State a similar bill providing for public access to the beaches of Texas, and I am hopeful that you will be just as successful in the Congress of the United States.

I also would like to say that I am especially appreciative of the opportunity of joining Congressman Sam Gibbons here as a member of the Florida Delegation. I have great respect for him, and I think that his participation, as you have indicated, Mr. Chairman, in the drafting of the legislation, as well as in helping to assist us in presenting it to the Congress, will prove valuable, and I am sure will aid a great deal in the ultimate passage of the bill.

I would like, Mr. Chairman, to present just portions of the written testimony I have prepared, and I would also like to request that the testimony in its entirety be preserved in the committee record.

Mr. ECKHARDT. Without objection it will be so ordered.

Mr. GUNTER. Mr. Chairman and members of the committee, I appreciate this opportunity to discuss with you today the National Open Beaches Act which a member of your distinguished committee, Beb Eckhardt, introduced with 45 cosponsors. I am proud to be among that number.

I would add to what Congressman Gibbons said in that I have a personal interest in that my District includes some of the finest beaches in America.

It is my distinct pleasure to convey to you the good wishes and support of the Honorable Reubin Askew, Governor of the State of Florida, who is unable to appear in person, but has authorized me to speak for him and the Florida Department of Natural Resources.

There is a great deal of interest and support for this legislation in our State. There has been evidences a great deal of media support, and I just quickly picked up two articles from my desk as I came to your committee hearing.

One is an editorial of support printed October 7 in the Palm Beach Times, and another article printed in the Miami Herald on October 3, indicating the interest of the Florida Environmental Land Management Study Committee in your bill.

Currently only 5 percent of the recreational shoreline of the United States is available for public use. The rapid deterioration of access to our beaches cannot be allowed to continue, and I believe that this legislation will once and for all clearly establish for our citizens the right to free and unrestricted use of the beaches.

In Florida, there are 1,016.36 miles of sandy beaches of which 309.2 miles, or less than one-third, are publicly owned. This figure, however, is further reduced because 52 miles of the 114.5 miles under Federal Government domain is closed to the public. This is due to the presence of a number of military installations and the Cape Kennedy complex near Cocoa.

In all, 262 miles of sandy beaches or approximately 25 percent of the total beach front in Florida is accessible to the public. This includes both private and publicly owned land.

While Florida does have more publicly owned beach front than many coastal States, it must be remembered that our State economy is in large measure dependent on free public access to the beaches.

And that access has been decreasing and growing more limited all the time.

It is not only a problem of access, but in many parts of Florida you cannot even see the beaches due to rapid shoreline commercial development.

This new development is most dramatic along the East Coast moving north of West Palm Beach and along the Panhandle on some of the Nation's most beautiful white beaches moving west from Panama City.

To a lesser degree, growth is affecting public access to beaches along the lower gulf coast of Florida. This is of particular concern to State, county and local governments because Federal beach restoration funds are dependent on road ends or public paths with upland public parking areas providing access to the beaches.

The fact that a great percentage of our Nation's shoreline is free for private development does not mean that private developers and individuals own the beaches down to the water. No State permits private developers or individuals to own the coastline outright.

Each State varies, however, in the exact footage of beach that it considers to be within the public's domain. In many States, including those of the eastern shores, private individuals are permitted to purchase land up to the mean high-water mark and beyond the waters.

As we move west, recognition of the public's right to beach land becomes stronger. In Hawaii we find that all beaches are deemed public up to the edge of the vegetation, or to the line of debris washed up by the water in absence of vegetation. The public in Hawaii can swim and surf up to the vegetation line without fear of trespassing on private property. However, even in Hawaii, the public may find no access to the beaches.

Thus, the public's legal ownership of the coastline has no recreational value to the public.

Increasingly, high rises, motels, vacation homes, hot dog stands, and other paraphernalia wall off the beaches, and in effect, deny the public access to beach property owned by them.

A rapidly expanding population with a concomitant rise in leisure time demands that attention be addressed to this problem.

Access to public beach lands is also denied in other ways. Towns along the beach areas restrict the use of the beaches in many ways. They attempt to assure that the beaches are used only by the residents of the town. This approach is particularly prevalent in the densly populated portions of the northeast. Courts are then faced with angry groups of citizens on both sides.

The nonresidents protest the town ordinances showing that their State and Federal taxes help to support the local beaches. The residents favor the ordinances, asserting that the beaches would be ruined by the hordes of city people.

In July 1972, the New Jersey Supreme Court resolved the issue in favor of the nonresidents. It told the town of Avon-by-the-Sea that the beaches belong to everyone, not just to the residents. It stated that the beaches must be open to all on equal terms and without preference.

If settled on a case-by-case basis, the issue will remain unsolved for years, and the hostility on both sides will mount. Courts in different States well may reach different conclusions so that some citizens have access to beaches, and others do not.

The problem could be solved in two ways. The Federal Government could purchase the land owned by private individuals which abuts the shoreline and create national parks thereon. This would be prohibitively expensive in our time of sky-rocketing land values. It would also exacerbate the tensions between private littoral landowners and the public.

Secondly, the Federal Government could pass legislation which would encourage the public use of the beaches by guaranteeing the right of access to beach land already owned by the public.

The second solution is relatively inexpensive, and permits private development to coexist with public use. The act introduced today adopts the second approach.

It prevents private individuals, real estate developers, hamburger stand owners, and motel owners from walling off the public beaches. It recognizes that the people from the entire country in our increasingly mobile and leisurely society deserve access to beaches.

However, it does not prevent private landowners from owning land abutting the beaches. It merely attempts to compromise the public and private interests.

The act creates a Federal-State partnership in preserving the public's access to the beaches. The act expressly provides that the beaches are subject to the sole control of the States. It in no way arrests the State efforts already underway at acquiring beaches for public use. It merely seeks to supplement and encourage those efforts by providing Federal funds amounting up to a maximum 75 percent of the planning and land acquisition costs.

The Federal law adopts the property law definitions of our more progressive Western States, such as Hawaii. Thus, it asures the public that the land purchased for public beaches will be sufficient for sunning and picnicking, without fear of trespassing on private lands.

If the State law does not so define the ownership to comply with the more progressive law, funds are provided for the purchase of such land and/or easements through condemnation.

The act guarantees access to Federal courts without regard to the amount in controversy. Furthermore, the Department of Justice is empowered to bring cases arising under the act.

Additionally, the act authorizes Federal assistance to the States to encourage them to develop transportation facilities to reach the beaches.

It also provides that Federal research facilities concerning beach lands shall be available for use by the States.

Your legislation, Mr. Chairman, would most certainly attack the problem in the most reasonable way. I will not include the written

testimony, but only request that it be included as you have indicated.

I will say in closing that the beaches of this country are part of our cultural and national heritage deserving national protection and encouragement. This legislation affirms the public's right to the coastal beaches, but at the same time, accommodates to private development.

As Congressman Gibbons said, I think it is a reasonably conservative approach to a very real national problem. It establishes financial assistance to the States to encourage them to develop their beach lands in a way so as to promote the public's interest and needs, while it permits States to tap the resources of the Federal Government in attaining the goal of public recreation.

So it is one of the best Federal, State and local partnership arrangements that I have seen in a long time.

Thank you very much.

Mr. ECKHARDT. I thank my distinguished colleague from Florida.

Mr. de la Garza?

Mr. DE LA GARZA. No questions, Mr. Chairman.

Mr. ECKHARDT. I just would like to say that I visited, I think, most of the typical areas of your beaches, and I find them wonderful places, both on the Atlantic and on the gulf.

However, I do remember I got lost in Sopchoppy one night, and that was not an altogether pleasant experience, but we are most thankful to you for bringing very helpful, factual testimony to this committee, and I certainly enjoyed the testimony.

Mr. GUNTER. I appreciate it, very much, Mr. Chairman.

Mr. ECKHARDT. Our next witness, also a member from the State of Florida and a coauthor of the legislation, Hon. Claude Pepper.

STATEMENT OF HON. CLAUDE PEPPER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. PEPPER. Thank you, Mr. Chairman and members of the subcommittee. A problem that is becoming acute in coastal States, but which unfortunately has not had the national exposure it deserves, is that of the growing restriction of beach property to public use. Even my home State of Florida, which is experiencing unprecedented economic, industrial, population, and almost every other conceivable kind of growth, is beginning to feel the pinch, despite its second longest coastline among the States.

I firmly believe that the legislation that is before us today, legislation which I have had the pleasure to cosponsor, will provide a workable solution to the beach access problem.

Mr. Chairman, the National Open Beaches Act is simple and direct in what it proposes. It declares a national policy that the beaches of this Nation, both public and private, should be left open, which means no fences, no barriers, and no "keep-off-the-beach signs." This is no crazy new concept dreamed up to infringe upon a beachowner's property rights. Instead, Mr. Chairman, it is an age-old concept that stems from our common law heritage and which says that the

beaches of the Nation are for the use of all of its citizens regardless of ownership.

Several States have already passed laws to assure that the public's interest in open beaches is recognized and enforced. As early in 1959 Texas passed an open beach statute, perhaps the first of its kind in the United States, and Oregon enacted similar legislation in 1969.

Hawaii has perhaps the strongest beach access laws. In 1968 the Supreme Court of that State ruled that all beaches are the property of the State and subject to its jurisdiction; and in 1970, the Hawaii Legislature enacted a shoreline setback law which prevents any new development within 40 feet of the "upper beaches of the wash of the waves."

Mr. Chairman, the point I am trying to make is that the legal concept of open beaches is not a new one at all, and it is not one that has not had adequate statutory expression by at least a few of our coastal States. In my opinion, there is ample precedent in State statutes and court decisions to support the existence of such a public right, and I believe the enactment of H.R. 10395 is necessary to give Federal statutory support of this concept.

But a Federal policy of open beaches alone is insufficient to solve the beach restriction problem. A Federal-State partnership is necessary to encourage State governments to take the initiative toward enacting beach access legislation and providing the necessary rights-of-way across private land to the beaches. H.R. 10395 establishes such a relationship and sets up a grant-in-aid program to assist in the acquisition of shoreland and easements on private land adjacent to shore areas. This Federal assistance, to be available on a 75 to 25 percent matching fund basis, will be used to purchase easements and to acquire right-of-way to assure accessibility across private land to the beachfront.

The findings in a recent University of Michigan sea grant report substantiate the need for land acquisition programs to assure beach access. The report concludes that those States which desire to provide for more public beach access "will have to look toward acquisition of easements on or the fee simple of appropriate areas through open space or outdoor recreation programs." Grants provided under sections 209 and 210 of this bill will give the States the necessary financial incentive to accomplish these necessary, but costly, tasks.

Undoubtedly there will be times when the public interest in beaches and shorelands will come in conflict with private property rights guaranteed by the Constitution. Tough judgments will have to be made, within the context of due process, concerning the validity of certain shoreland titles and the adequacy of compensation for condemnation that, by necessity, will occur. Therefore, this legislation also would allow Federal attorneys to bring suit in Federal courts to properly adjudicate any disputes that might arise between public and private claims to shorelands, and to uphold the proposition stated in section 203 that—

> No person shall create, erect, maintain, or construct any obstruction, barrier, or restraint of any nature which interferes with the free and unrestricted right of the public, individually and collectively, to enter, leave, cross, or use as a common the public beaches.

In any litigation brought in Federal court under this act, the burden of proof will be placed squarely on those persons who try to restrict entry to beach areas. Furthermore, my land acquired under Federal condemnation proceedings will clearly revert to State, and not Federal, control.

Mr. Chairman, in Florida 80 percent of our population lives in the coastal countries, the majority of which reside along the seaboard edge. Also we have one of the longest coastlines in the United States, over 2,655 miles, second only to Alaska in length. Yet, over 2,372 miles of our State shoreline is in private hands, many, many miles of which are completely closed for public recreational use. Contrast these figures with the meager 300 miles of publicly owned recreation beach land, and you begin to have some understanding of the seriousness of the beach access problem.

Florida, perhaps more than any other State, depends upon the beaches for recreation, not to mention the many millions of tourists that come to the State each year to enjoy our pleasant climate. And our economy is no less dependent upon the maintenance of free and open beaches. I firmly believe that the provisions of this bill are in the best interest of Florida. I support it and I urge its speedy enactment.

Mr. ECKHARDT. That was an excellent statement Congressman. The Chair would like to thank you on behalf of the subcommittee.

Our next Florida member, the Hon. Bill Lehman, will now give his statement.

STATEMENT OF HON. WILLIAM LEHMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. LEHMAN. I appreciate this opportunity, Mr. Chairman, to offer my testimony to your subcommittee on the National Open Beaches Act.

As a Congressman from South Florida, I hope that the information I present here will serve as a warning of what can result when there is no formal policy as to the public's right to the beaches.

Miami, often called the Gold Coast, is the home of many fabulous hotels, convention centers and high-rise condominium complexes. It is famous in great part due to its sunny climate and beautiful beaches. Unfortunately, all of these enormous structures, lined up along the beach, create a giant concrete wall which closes the beaches off to the residents of Miami. Similarly, if a family comes to visit South Florida, and is unable to get a reservation at a beach-front hotel, it is quite possible they will never even see our magnificent beaches.

Florida has a total of 2,665 miles of shoreline, according to the Outdoor Recreation Resources Review Commission. 1,078 miles of this are beaches, almost five times as much as has any other State. 161 miles of this shoreline are publicly owned recreation areas, and 122 miles are publicly owned restricted areas. 2,372 miles along the shore of are privately owned by corporations, hotels, and individual landowners.

It seems that the past few years have seen an exodus to the beaches, and it is not surprising that swimming has replaced driving for pleasure as the number one national pastime.

With this new enthusiasm has come a corresponding reluctance on the part of private beach-front owners to allow public access to the water. In Florida, while the public has won ownership of that portion of the beach between the high and low water mark, this victory is meaningless when "No Trespassing" signs bar access to it.

To get around this problem, Hallandale, which is a city in my district, has been attempting to purchase the Hallandale Beach for the use of the public. Hallandale Beach is the only beach left between North Miami Beach and Fort Lauderdale which has not been bought up by condominiums. It is only 1,100 feet long. Its value has been estimated at $10,000 per foot. Overall, the property has been appointed at $10 million. Two and a half years ago, Hallandale could have purchased the beach for about $7 million.

Now the city is seeking Federal assistance. Yet Florida's share of the land and water conservation funds is expected to be only $1.2 million in 1974 and $4.9 million in 1975.

An excellent article on this problem appeared in the Miami Herald several months ago, entitled "Where Have All the Beaches Gone?", which I submit for the record. It gives a good overall view of what has happened to Florida's beaches in the past few years, and I commend it to your attention.

Mr. ECKHARDT. The article will appear at this point in the record.

[The article referred to follows:]

[From the Miami Herald, Apr. 22, 1973]

WHERE HAVE ALL THE BEACHES GONE?

(By Mike Toner)

Florida's beaches—and the ocean itself—are fast disappearing behind a curtain of concrete.

From the state's Panhandle to the Keys, sand dunes are giving way to condominiums and waving stands of sea oats are being replaced with cold concrete seawalls.

In the cities, there are already just two ways to reach the surf—down the elevator of an oceanfront high-rise, or across the blankets of fellow beachgoers, packed elbow-to-elbow on whatever small stretch of sand has been salvaged from the last land boom.

In Miami Beach, there are solid miles of shoreline where the shadows of tall buildings darken the beach by early afternoon, where there isn't any beach at all at high tide, and where the public doesn't care because they can't see any of it anyway.

On Sand Key, near St. Petersburg, one major developer even "protects" his beach from the public with a six-foot-high barbed wire fence.

That's in the cities. But even on the most deserted, windswept dunes, the privately owned shoreline in Florida is undergoing a transformation that may eventually impede public use of as much as three-fourths of the state's sun-bleached beaches.

An estimated 600 miles of private beachfront is at stake—three times the amount now held by the public.

The price of private oceanfront is, quite simply going up. It is, in the jargon of the real estate trade, "going out of sight."

On Florida's Gold Coast, a sandy beach is already the next best thing to gold, with prices as high as 10,000 a front foot—$50 million a mile.

Even on the remote stretches of the state's Gulf Coast, the going price for a strip of sand is $500 a foot and rising rapidly as more and more people attempt to shoulder their way onto the seashore.

The trend may be a speculator's dream, but it is a nightmare for the public agencies trying to snatch up the last open stretches of beach left.

Two things are happening as the prices rise.

The State's limited funds simply don't stretch as far. The same amount of public money buys less beach.

And the rising prices along the oceanfront that remains in private hands are forcing owners to build the one thing that allows them to turn a profit—high-density, high-rise, high-price developments.

Big development demands big money and on both coasts of Florida, some of the nation's largest corporations—U.S. Steel, International Telephone and Telegraph, Westinghouse, Gulf Oil, Disney, and others—have moved onto the beaches with grandiose plans for their transformation.

ITT, for instance, plans to build a new town of 750,000 between Daytona Beach and St. Augustine, one of the last undeveloped portions of the state's Atlantic Coast.

All levels of government now own less than 200 miles of beachfront in Florida—much of it inaccessible to the public—and the recreational demands of both tourists an residents are expected to overrun the available beaches by 1975. There is an urgency in acquisition efforts.

"In acquiring beachfront, our operating precept has always been to get in and get it while we can," explains Ney Landrum, director of the state's Division of Parks and Recreation.

"It is a limited commodity, and once it is gone, there simply isn't any more."

It is going fast—far faster than the state can save it.

In the last three and a half years, the state has only been able to wrest approximately 10 miles of beachfront land out of the hands of private interests—at a cost of roughly a million dollars a mile.

The average outlay for all state parks acquisitions has recently been averaging $7.5 million a year.

This year, the state hopes to save one of the last open beaches on the lower Atlantic coast—a mile-long strip of sand on Hollywood Beach.

The price is expected to be $15 million—a sum that may put a major dent in the $40 million in bonds that the state will sell this year to purchase recreational lands throughout Florida—inland as well as oceanfront.

The state, in fact, now owns only about 60 miles of beaches on its own shoreline. Some of them are on islands without access to the mainland.

Federal ownership is even greater, but most of the U.S. owned lands are either hard to reach—like those bordering the Kennedy Space Center—or completely off limits—like those bordering Eglin and Tyndall Air Force bases.

The new Gulf Islands National Seashore near Pensacola is open to the public, but even there—on stretches of private beachfront scattered throughout the seashore—spectacular seascapes are being razed by bulldozers.

"Florida has no mountains or snow; the beaches are one of the few things the state has of real beauty, but we seem to be doing our damndest to cut them off from the public," observes Barry Richard, Florida's Assistant Attorney general for most of its beachfront litigation.

"On both the Atlantic and the Gulf, people are building like crazy; they are flooding the beach areas with condominiums and some of those areas are just going to be ruined."

As beaches go, Florida is richly endowed. It has a longer coastline than any other state except Alaska.

It is the only state with two coasts. Both abound with an almost infinite variety of beaches.

Along the Atlantic, the sweep of sand is virtually unbroken for 378 miles miles from the Georgia border to the southern tip of Miami Beach.

From the north, the character of the sand changes subtly from pink coquina and shell to the white, hard-packed sands of Daytona and then finally to the golden brown beaches of South Florida.

On the Gulf of Mexico, an intricate mixture of finely ground sand and shells stretch northward from the 10,000 Islands to St. Petersburg and then gradually disappears into the indistinct shoreline of the Big Bend in the Florida peninsula.

When the beaches re-emerge on the islands off Carrabelle, they are made up of sugar-white quartz sand and backed by rolling dunes up to 50 feet high.

The beaches, washed by clean water and well warmed for most of the year, have attracted millions to Florida—some to visit and some to stay.

Today, 80 per cent of the state's seven million residents live in its coastal counties and three out of every four new residents are settling as close to the beaches as they can afford.

In the beginning, there were no serious conflicts between private and public rights to the beaches. When a building blocked a beaten path down to the surf, the people simply found somewhere else to go.

Eventually, however, there were buildings there too.

As early as the 1950s, the Florida Supreme Court reaffirmed the public's right to the portion of the beach known as the foreshore—the part uncovered at low tide.

The ruling was hailed as a great victory for the people, but it has left the public with two major problems that are still unresolved:

Even with public ownership of the beach below the high water mark assured, what does the public do at high tide when all of that sand is covered and how do they get to it in the first place when the shore behind it is sealed off?

Those who can afford it, have simply dodged the problem by buying homes, or villas, or apartments, or membership in clubs on the ocean.

In one of Bal Harbour's newest oceanfront condominiums, the cost of an apartment on the ocean begins at $67,000.

Further up the Atlantic Coast, where prices are more plebian, a window on the ocean can be had for as little as $35,000.

"It's mostly a status symbol," one condominium marketing director explains frankly.

"Some people just have to have an ocean view; they buy it and move in. "They don't swim in the ocean; they don't fish in it; they don't go to the beach. After a while, they put heavy drapes across their picture window and don't even look at it."

Whether they look at the ocean or not, however, something seems to lure people to unspoiled shores. There is even a modest exodus from the highly fortified oceanfront of the Gold Coast.

A hundred miles up the coast, a burgeoning condominium complex on Hutchinson Island is drawing an estimated 45 percent of its buyers from the Miami area.

Hutchinson Island is what Miami Beach once was—a thin, barrier island on the Atlantic Ocean infested with mosquitos but blessed with beautiful beaches.

It is becoming what Miami Beach is today—at least partially under the pressures for unspoiled oceanfront created by people fleeing one already spoiled.

In the last year and a half, the 20-mile long island has seen the arrival of a new Holiday Inn, a new Ramada Inn, and a new Sheraton Inn—all on the ocean.

Budding new "Turtle Reef" condominiums—soon destined to be a series of eight-story buildings—claim to be for "people who like to walk for miles on unspoiled beaches."

At the north end of the island, Gulf Oil is at work on a joint development project that will eventually put 2000 condominium units on a site fronting the ocean for two-thirds of a mile.

And in the middle of the island, Florida Power and Light Co. is putting the finishing touches on a white-domed nuclear reactor. A second one will soon be under construction.

Residents of the area, however, have not been content to sit back and watch Hutchinson Island go the way of Miami Beach.

Under the banner of a group known as "Save Our Beaches," residents have raised more than $200,000 which they hope to parlay into a total of $800,000 in matching federal, state, and county funds to buy eight 100-foot wide public access strips to the beach.

Students at Martin County High School washed cars, sold flowers and worked for weeks at odd jobs to raise $25,000 for the effort. Students elsewhere in the county chipped in $11,000 more.

"They believe in the beach and they believe in keeping it—at least a small part of it—free of development," explains Martin High Principal Terrence Horrigan.

Developers, however, also believe in what they are doing and so far only three of the hoped-for access strips have been secured. Public purchase of the beachfront is moving slowly, even when the offering price is $1,000 a front foot.

But beachfront will never be cheaper. The city of Clearwater on Florida's other coast can testify to that.

Four years ago, the city had the chance to buy the last undeveloped beach in the St. Petersburg area when the estate of millionaire Ed Wright went up for sale.

The city decided it couldn't afford it. So did Pinellas County.

But the property—nearly two miles of beach along the northern tip of Sand Key—didn't stay on the market for long.

A subsidiary of U.S. Steel purchased the entire .158 acres on the island, for a price estimated at between six and seven million dollars. The plans for high-rise buildings by the Gulf surfaced almost immediately, plans the company called the highest and best use of the land.

"If we hadn't bought it and built on it, someone else would have," reflects U.S. Steel Realty Vice President Robert McNay.

Under intense pressure from a citizens lobby called "Save Sand Key" the city changed its course and began negotiating with U.S. Steel for a portion of the company's beachfront.

Save Sand Key waged an intense and often bitter campaign against the company.

The group's president, Clearwater attorney Tom R. Moore even put the campaign into music.

His bluegrass-style "Ballad of Sand Key" even turned up in some of the city's record shops, popularizing the cause:

"Takin' our beach,
Takin' our pines,
Carpetbaggin' men
With their dollar-sign minds."

Largely in support of the efforts to save Sand Key, Pinellas County voters agreed to impose a one-mill tax on themselves for two years for the purchase of recreational lands.

"We pushed and pushed and pushed," Moore recalls. "But all the time we were pushing, the price was going up and we were having to lower our demands."

Finally, U.S. Steel agreed to sell Clearwater 1,800 feet of beachfront, roughly one-fourth of the company's Gulf frontage.

The price was $6.6 million, about what the corporation had paid for the entire area four years earlier.

The onslaught of development, however, is coming even to the sleepy lower Gulf Coast, to which many Miamians still drive the 100 miles for a day at an uncrowded beach.

Coral Ridge Properties Inc., a subsidiary of Westinghouse, has announced its plans to begin a joint development project on a three-mile stretch of Gulf frontage north of Naples.

Company officials insist that the development will not mimic Miami Beach.

"We think everybody will be surprised with what we finally come up with," says one executive.

Naples residents are waiting to see, despite the fact that the company's only other oceanfront development in Florida is Broward County's Galt Ocean Mile, better known there as "the Galt wall."

To the south of Naples, at the Deltona Corp.'s sprawling Marco Island development, there has been a compromise over public and private rights to the beach. The public has fared better there than in most parts of Florida.

The public will have, courtesy of the developers, a full half mile of beach at the northern end of Marco Island.

The residents of the development will have the remaining portion of what the company's brochures describe as "a three-mile, shell-studded, crescent of powdery sand and emerald surf, one of Marco Island's most magnificent features and perhaps the most beautiful beach in the world."

To reinforce the lines of the compromise, however, a beach in the center of private sector now used heavily by the public will be closed. The new public beach will be isolated from private sands by a barrier canal.

Another compromise at Marco has also given the public two and a half miles of scenic beaches in nearby Kice Island—in return for state approval of the company's development plans.

The only way to get to Kice Island is by boat.

"If we'd only had $7 million in 1964, we could have beat the Mackle brothers to Marco Island," laments parks director Landrum. "We could have had the whole thing."

Even having the whole thing, however, does not always adequately protect the public.

The public had a whole mile of beachfront north of Naples earlier this year —the heavily used, but undeveloped state park at Wiggins Pass.

Then construction crews for a beachfront hotel adjacent to the park bulldozed their way through the only access road and at least temporarily left the elderly residents of Naples with one way to reach the beach. Walk.

In many areas of the state, in fact, the routes to the beach are becoming an increasingly difficult obstacle course.

In Jacksonville Beach, public street ends—once relatively well dispersed access points along privately owned beachfront property—are being abandoned at the request of the property owners.

And on the lush shores of Palm Beach, there are even no trespassing signs on street ends that are still dedicated as public rights of way.

Most have been strategically placed to help preserve the private character of the beaches in front of the city's finest homes.

And when irate tomato grower Bill Medlen recently decided to make an issue of the matter by painting the signs pink, he was arrested by Palm Beach police for "defacing public property."

"I enjoy the beach," explains Medlen. "I like to swim in the ocean and fish in it. I like to walk along the beach. And sometimes I just like to sit and listen to the water wash up on the sand."

"But I've lived here all my life and I've seen the places where a person can get to the beach become fewer and fewer.

"I thought maybe by standing up for my rights, I could get other people to do the same. If they don't, they're not going to have any left."

There are, of course, private rights too.

But not all of the state's beachfront landlords have yet felt compelled to exert their rights to the sands.

One of them, ironically, is Jacksonville millionaire Ed Ball, a long-time nemesis of the state's conservationists.

Ball's St. Joe Paper Co. owns more than 20 miles of the state's Gulf coastline, about half of it in sandy beaches.

Company officials say there are no plans to build on it.

"We like to see a little open beach out there somewhere," says one official. "Right now, we're just growing trees on it."

Because it is one of the few stretches of coastline for which there are no imminent plans, Florida officials are content to see the shoreline stay in Ball's hands.

They can't afford to buy it now anyway but as long as it stays in the hand of a single owner, any effort to get it in the future could be greatly simplified.

That is not the case with most of the rest of the state, where hundreds of persons sometimes own the beachfront in 50 and 100-foot lots.

"Without the power of eminent domain, we have to compete on the open market—along with private interests—when we want to acquire a piece of beachfront," says Landrum.

"It's hard enough when you have to negotiate with large property owners, but when you start talking about stretches of beach where there are lots of small owners, it's a frightening prospect."

In spite of the problems, optimists see the tide of beachfront battles turning slowly in favor of the public.

Last year, for instance, a Florida appellate court ordered the owner of a $125,000 observation tower on Daytona Beach to tear the structure down.

The court ruled that the 176-foot space needle had been improperly built on sands that the public had acquired an easement to through more than 20 years of "sunbathing, picnicking, frolicking, and running of dune buggies."

The suit had been originated by owners of a nearby, competing observation tower, later joined by the state of Florida.

In a later ruling, however, the court hastened to add that the ruling should apply only to the Daytona case and should not be applied to other disputes over public and private rights to Florida's beaches.

The matter is still being reviewed by the Florida Supreme Court.

Under existing law, the state also has the power to impose setbacks on coastal construction, but the establishment of a setback line has proved to be painstakingly slow and it does nothing to guarantee public access to the beaches.

"Ideally, the easiest solution to the crisis along Florida's beaches would be government purchase of all the undeveloped Gulf and oceanfront land that is now in private hands," says Brad Raffle, the founder of a fledgling statewide coalition of beach preservationists called "Coastal Concern."

"Unfortunately, the cost would bankrupt the state."

Theoretically, since the front foot cost of Florida's 782 miles of sandy beaches ranges from $500 to $10,000, the total cost could lie anywhere between $2 billion and $40 billion.

In reality, however, the beaches have no meaningful price tag.

They are a priceless natural resource, both for the state's residents and for its visitors.

But with the acceleration of the development of its privately owned beaches, the cost of "business as usual" could be incalculable too.

Florida could be the first state to preside over the destruction of two coasts.

Mr. LEHMAN. I would urge the members of this subcommittee to carefully consider what has happened in my State, and I hope that the necessary steps will be taken in the very near future to insure public access to our shores.

Mr. ECKHARDT. The subcommittee thanks you for your fine statement Mr. Lehman.

I note the charming gentlelady from Hawaii would like to give us here testimony at this time.

STATEMENT OF HON. PATSY T. MINK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF HAWAII

Mrs. MINK. I appreciate this opportunity to comment on legislation to establish a national policy with respect to the Nation's beach resources.

Although my State of Hawaii is small geographically, compared with most other States, our 750 miles of shoreline are exceeded only by California's 840, Florida's 1,350, and Alaska's 5,500. Historically, the beaches have been an important aspect of Hawaiian life, with the life-style based on close proximity to the shore from almost any point of land within the State.

In Hawaii, all beaches are owned by the State. The Hawaii Supreme Court in the 1968 decision of *Application of Ashford*, held that the location of the boundary between private upland property and public-owned beach was, "the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris * * *" This ruling provides far more beach area to the public than is the legal rule in a number of other jurisdictions where the

mean high water mark is accepted as the boundary. It is also compatible with the definition used in H.R. 10394, of which I am a cosponsor of, "that area which lies seaward from the line of vegetation to the sea." The use of a vegetation line standard in Hawaii added 20 to 30 feet of dry sand to the public domain in the *Ashford* case.

Although the *Ashford* decision in Hawaii may guarantee public ownership of all of Hawaii's beaches, the problem of assuring public access to these beaches has not been resolved. The Hawaii Legislature has expressly recognized that beach access is to be preserved, and has delegated control over State-owned public lands to the department of land and natural resources. The department is required to lay out, establish, and reserve public access to the beach in any shoreline property sold, leased, developed, or otherwise disposed of by the State.

Despite legal ownership, actual public use of beaches in Hawaii has often been frustrated by lack of convenient access. The statutes requiring rights-of-way to the sea prior to disposition of any public lands apply only to future developments. Governmental efforts to secure access through areas from which the public has already been excluded must involve either condemnation of existing property rights and compensation to private owners or court action. Any program involving condemnation of rights-of-way would result in extending eminent domain proceedings, and large public expenditures in purchasing the land. This has prevented sufficient progress in opening all of Hawaii's beaches to the public which owns them.

Under H.R. 10394, Congress would establish a national policy that the beaches of the United States, "are impressed with a national interest and that the public shall have free and unrestricted right to use them as a common * * *" The bill would prohibit the construction of, "any obstruction, barrier, or restraint of any nature which interferes with the free and unrestricted right of the public, individually and collectively, to enter, leave, cross, or use as a common the public beaches."

To secure this goal, the Secretary of the Interior would be authorized to make grants to States for up to 75 percent of the cost of, "planning, acquisition, or development of projects designed to secure the right of the public to beaches where adequate State laws are established * * * to protect the public's right in the beaches."

In addition, the Secretary of Transportation is authorized to provide financial assistance to any State and to its political subdivisions for the development and maintenance of transportation facilities necessary in connection with the use of public beaches, such as highways and roads to the shoreline area, parking lots, and park areas.

If enacted, this legislation would help fill the gap between promise and performance in providing full public access to beaches in Hawaii and other States. I feel that the legislation is in the public interest and urge its approval.

Mr. ECKHARDT. That was a very provocative and enlightening statement. The subcommittee appreciates your time.

Our next witness is one of the most capable and knowledgeable members on this committee, the gentleman from Ohio, Hon. Tom Ashley.

STATEMENT OF HON. THOMAS L. ASHLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. ASHLEY. I appreciate very much this opportunity to testify in support of H.R. 10394, legislation to establish a national policy for open beaches, which I am proud to have cosponsored with our distinguished colleague from Texas and fellow member of this committee, Hon. Bob Eckhardt.

The problem of restricted access to beaches affects all Americans who value the recreational amenities that the sea provides. There is something infinitely relaxing and invigorating in spending a week, or even an afternoon, at the beach that most of us find hard to describe, but nevertheless have experienced at one time or another. We look to the shore as a temporary refuge from the confines of our city environment, and no matter how crowded the beach may be, it always seems somehow more quiet and relaxing than where we work and live.

This happy existence is even more rewarding when viewed in its environmental impact on coastal areas. As compared to most other uses man makes of coastal resources, tourism and recreation are low, and relatively harmless, consumers of natural resources. With the exception of the consumption of prime beach lands by structures and facilities for recreation, generally the resources upon which tourism and recreation depend are left moderately unimpaired, though used. Whenever a visitor views the panorama of the ocean, whenever he uses a boat, whenever he photographs a scene, or whenever he runs along the beach, he leaves the beach virtually as he found it. As one writer put it—

> The product of tourism and recreation is the individual experience. As such, it is composed not so much of material goods as of psychological impact. Therefore, what one experienced today may be replicated day after day by thousands more with virtually no delay in the resource.

In recent years access to some areas of the coastline has been restricted by private propertyowners, thereby diminishing the amount of beachland available to the general public.

Many of those who fence off the beach are individual owners seeking to protect their privacy; most however are beach resort, "country club" developments which cater to the affluent and depend upon sparsely populated unaccessible beaches as their main attraction. All of this has been further complicated by a dramatic increase in the population of coastal States in recent years. This, of course, has had a direct impact upon increased recreational use of beaches and the proliferation of accompanying residential and commercial development.

About one-third of the entire tidal shoreline of the United States is classified as "recreational shoreline", which has been defined according to the accessibility and the usefulness of the shore for recreational pursuits. The Outdoor Recreation Resources Review Commission reported in a recent study that there are 17,853 miles of recreational shoreline in the continental United States of which 3,915 miles is listed as beach, 8,121 as bluff, and 5,817 as marshland.

When we look at a breakdown recreational shoreline ownership, we find that 1,294 miles of it are publicly owned, 524 miles of which is restricted for military and other uses, while 16,559 miles are in private ownership.

According to the ORRRC study, the most restricted beach areas are, ironically, in the more populated Northeast section of the country. Of the 5,912 recreational shoreline miles in this area—which includes the Great Lakes portion of New York—5,654 is under private or restricted public ownership, which means that 97 percent of of the shore is inaccessible to the general public. Although the beach access problem is not as critical in other sections of the country as it is in the Northeast, statistics show that a large portion of the Nation's beaches are indeed reserved for the use of the privileged few who either own or have an interest in them. The public has no choice but to crowd into the few public areas that remain.

Unlike traditional land use conflicts, the problem of restricted beach access is not characterized by conflicting uses. Generally, when a privately owned beach is fenced off, the owner intends to use the beach for recreational purpose, just as those who would seek to have the beach opened up would use it. This is not to say, of course, that the use of land back from the beach would not be in conflict, since some might prefer that it belt left in its natural state rather than be used as a site for whatever residential, commercial or industrial enterprise the owner might have in mind. But as far as the beach itself is concerned, the question to be answered is whether, by virtue of his ownership of the land, the owner should be able to deny others the use of the beach for recreational purposes. It is this problem that the National Open Beaches Act seeks to settle.

Mr. Chairman, in my opinion the most important provision in H.R. 10394 is the one which would establish a public right to the free and open use of coastal beaches. This provision, found in section 202 of the bill, provides that—

> Congress declares and affirms that the beaches of the United States are impressed with a national interest and that the public shall have free and unrestricted right to use them as a common to the full extent that such public right may be extended consistent with such property rights of littoral landowners as may be protected absolutely by the Constitution.

This would reaffirm once and for all the age-old concept that the Nation's beaches are for the recreational enjoyment of all of the citizens of the country and that it is the responsibility of the Federal Government to protect the right of the public to enter and use these areas.

The bill would take several steps to assure that a national open beaches policy is effectively implemented. First it would establish a grant-in-aid program under section 209 to pay for up to 75 percent of the cost of any planning, acquisition or development projects that might be undertaken by the State for the purpose of securing the right of the public to beaches. No State would be eligible for a grant until it has first passed adequate laws to protect public rights to coastal beaches.

Additional financial assistance would be available to coastal States under section 210 of the bill for developing and maintaining

necessary transportation facilities to facilitate the use of public beaches. Again State eligibility for funds under this section are predicated upon the State having enacted a State open beach law.

Another important substantive feature in the bill would make it unlawful for any person to erect a barrier near a beach to prevent the public from using it. The Attorney General is given the authority to bring suit against any landowner who might attempt to restrict access to public beaches, and a citizen or group of citizens would be allowed to file in any Federal district court in order to obtain an injunction, or other suitable relief, against a propertyowner who refuses to remove his beach barrier. A showing by the prosecutor that the land in question is indeed a beach and is being restricted would be sufficient evidence to base a determination that the public right to free access to beach areas has been violated.

H.R. 10394 is rather explicit in its definition of what is to be regarded as a beach for the purposes of this act. The national policy would cover all beaches that are "affected by wave action from the open sea", which would include all land seaward from the line of vegetation. In those cases where there is no "line of vegetation" a beach will include all land "formed by wave action" not to exceed 200 feet inland.

Mr. Chairman, more people and more leisure time make it imperative that our citizens be accorded the right to free access to the beaches. At a time when noise, crowds, dirt, crime, heat, traffic, and smog make life unpleasant for so many people, the availability of an escape to nature to seek relaxation and renewal of creative energies take on a new dimension. Recreation in natural surroundings can no longer be considered a luxury reserved for those who can best afford it; it is a social necessity. That is why this legislation is so important, and that is why I have co-sponsored it and I now urge its adoption.

We, in Congress, should no longer ignore the basic issue raised by this legislation. Although the principle of public right to beaches is often thrown up to us as a concrete maxim emanating from common law doctrines, we must realize that private property rights have always had to give away to the reasonable demands of society. However, the enactment of H.R. 10394 provides an opportunity for Congress to clarify the law by going on record as affirming a public right to coastal beaches. In addition, it would establish the necessary financial assistance and institutions whereby such a policy can be effectively realized.

It is my hope that this legislaiton will be carefully—yet speedily—considered, perfected, and sent to the floor for final passage before we see the adjournment sine die of the 93d Congress.

Thank you.

Mr. ECKHARDT. An excellent statement, Tom. We certainly want to thank you for your statement.

Mr. ASHLEY. It was my pleasure Mr. Chairman.

Mr. ECKHARDT. Our next witness will be Hon. Douglas Wheeler, Deputy Assistant Secretary for Fish, Wildlife, and Parks, Interior Department.

STATEMENT OF HON. DOUGLAS P. WHEELER, DEPUTY ASSISTANT SECRETARY, FISH, WILDLIFE, AND PARKS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY ROBERT WEAVER, OFFICE OF LAND AND WATER USE PLANNING, AND RONALD LAMBERTSON, OFFICE OF THE SOLICITOR

Mr. WHEELER. Good morning, Mr. Chairman, members of the subcommittee.

I have a brief written statement that I would like to read for the record, and then we would attempt to respond to your questions as you think appropriate, if that pleases the Chair.

Mr. ECKHARDT. That would be very appropriate.

Mr. WHEELER. I would add that I have with me, Mr. Chairman, Mr. Robert Weaver, who is from our Office of Land and Water Use Planning, and Mr. Ronald Lambertson, who is with the Office of the Solicitor of the Department of the Interior.

It is a privilege for me to appear before this committee to testify on H.R. 10394, "To amend the Act of August 3, 1968, relating to the Nation's estuaries and their natural resources, to establish a national policy with respect to the Nation's beach resources."

Mr. Chairman, as you know, the Department of the Interior is committee to the protection and preservation of the Nation's beaches for the enjoyment of the American people.

As a consequence of its responsibility for the conservation of the Naiton's natural resources, the Department has acquired and now manages for public enjoyment beach and seashore areas of special significance on all coasts of the United States.

I might add, Mr. Chairman, we have a map here which depicts the holdings of the National Park Service in red in coastal areas, and those of the Bureau of Sport Fisheries and Wildlife in blue.

These include beaches designated as National Seashores at Cape Cod, Mass.; Fire Island, N.Y.; Assateague Island, Md.-Va.; Cape Hatteras and Cape Lookout, N.C.; Padre Island, Tex.; and Point Reyes, Calif.

Also administered by the National Park Service of this Department are lakeshores at Indiana Dunes on Lake Michigan and Pictured Rocks on Lake Superior in Michigan, and national recreation areas on New York Harbor and the Atlantic Ocean in New York and New Jersey, and on San Francisco Bay and the Pacific Ocean in California.

Sea beaches are also an integral part of several national wildlife refuges administered by the Department through its Bureau of Sport Fisheries and Wildlife.

Furthermore, we recognize that no comprehensive program for the protection of our Nation's beaches and the assurance of their availability for recreational and other uses will succeed without close cooperation between coastal States and the Federal Government.

On their own, and in this spirit of cooperation, coastal States and political subdivisions thereof have made use of available resources, including the Land and Water Conservation Fund, to acquire beach

areas susceptible to recreational and other uses by great numbers of their citizens.

While our own programs demonstrate concern for the preservation of reasonable public access to the Nation's beaches, we do not agree with some of the assumptions on which H.R. 10394 is based, and believe that its enactment will complicate the problems that surround use, ownership and management of that land mass which lies "seaward from the line of vegetation to the sea."

Uses and management goals other than unrestricted public access should include the preservation of esthetic and ecological values of fragile beaches and wetlands, protection of wildlife and plant habitat, primarily in estuary areas, continued food production for aquatic life, and sedimentation and storm control.

H.R. 10394 is intended to provide the public with free and unrestricted access to and use of the Nation's beaches along the Atlantic, Pacific and Arctic Oceans, the Gulf of Mexico, the Caribbean and Bering Seas, and the Great Lakes.

This objective would be accomplished by actions brought the Attorney General of the United States or a U.S. district attorney in Federal district courts to establish that the public has a preeriptive right to the use of the beaches as a common.

In cases where such rights could be established, the bill authorizes the condemnation of such easements as may reasonably be necessary to accomplish free access and would authorize Federal financial assistance up to 75 percent of the acquisition cost.

In addition, the bill would authorize financial assistance to State and local governments for the development and maintenance of transportation facilities, including access highways and parking areas, necessary for use of public beaches.

Section 202 of H.R. 10394 would have Congress declare that the beaches of the United States are impressed with a national interest, and that such interest implies a public right to free access. To the extent that we are all concerned with the preservation of any area to which can be ascribed certain environmental or social values, it is appropriate to affirm the existence of a national interest.

But we question whether it is possible or even desirable to state that this interest is best served in all cases by the development of means to assure free and unrestricted public access.

It is the concomitant of so broad a declaration that every beach in the United States is susceptible of unlimited public use, as section 202 asserts, and that each is best suited to such use.

We cannot agree with this assumption.

Section 206(a)(3) of the bill itself contains partial recognition, at least, of the fact that a national interest in the preservation of wildlife, for instance, may not be compatible with an unrestricted right of public access. Nor is it at all clear that the population would value access to every beach knowing that some are better suited to recreational use than others.

Although section 207 provides that the Secretary shall determine which actions will be brought to protect the public right, and thus to make more accessible a given beach, it does not suggest any criteria by which he would be guided.

Although it is seen as "desirable that the States and the Federal Government act in a joint partnership," the role of the States is not well defined.

As easement or other interest obtained in the Federal courts by means of an action initiated by the Secretary would accrue to the State.

If condemnation proceedings are required, the State would be compelled to make a contribution without necessarily having approved the Secretary's course of action.

No mechanism is provided, other than the suggestion of a partnership, for the resolution of differences which could arise if the Secretary saw a national interest in the acquisition of certain interests that was not as readily apparent to State authorities, who would be asked to contribute to the costs of their acquisition.

Mr. Chairman, we are also concerned about the assumption that States will be able to exercise their newly acquired ownership, control, and authority in a way that is compatible with the national interest impressed by this act upon the beaches.

Notwithstanding its substantial contribution toward the cost of acquisition, the Federal Government would be specifically precluded by section 206(a)(2) from taking any action that would "impair, interfere or prevent the States * * * (from exercising) control of the public beaches in behalf of the public for the protection of the common usage or incidental to the enjoyment thereof * * *"

A State, once having acquired control, would be free to manage the public beaches as it saw fit, so long as its management was conducive to "protection of the common usage" or was "incidental to the enjoyment" of the beaches.

To protect the "common usage" is not necessarily to protect the environmental values whose loss may be threatened by that very usage. It is not difficult to conceive of a situation where, public access having been assured, a State would find itself without the capability to management effectively a more intensive use.

We believe that the appropriate objective for management of our beaches is to provide a mechanism for balancing the often competing interests of public access for recreation and the preservation of important environmental values. This can be accomplished pursuant to a policy established by the Congress and this committee, provided in the Coastal Zone Management Act of 1972.

Through effective management and efficacious use of their authority to regulate land use, we are hopeful that the States will be able to protect against further encroachment and to meet the need for preservation of our Nation's beaches.

As you have indicated, Mr. Chairman, many of the States have already taken very strong positive action in that direction.

To that end, the Coastal Zone Management Act addresses a national interest in effective management by the States of our entire coastal zone. It recognizes the existence of competing uses, provides a means for their accommodation, and a mechanism for partnership between coastal States and the Federal Government.

As President Nixon stated in his message on "Natural Resources and the Environment," transmitted to the Congress on February 15,

1973, "Land use policy is a basic responsibility of State and local governments. They are closer to the problems and closer to the people."

The Coastal Zone Management Act seeks to assure proper management by the States of their estuarine and coastal resources, through development and implementation of a program in which the Federal Government concurs.

As you know, the administration has requested funding for the State assistance provisions of the Coastal Zone Management Act. The funds appropriated by the Congress pursuant to this request will be used for the development and administration of State comprehensive coastal zone management programs.

We believe that this is a feasible approach, more likely to be successful in a shorter period of time than the costly process of litigation and compensation proposed in H.R. 10394.

Thank you, Mr. Chairman. That concludes my prepared statement.

Mr. ECKHARDT. Mr. Secretary, I have a few questions of your statement.

First, you state that the bill might complicate control by the Interior Department of beaches which are presently national seashore areas or otherwise public beaches under Federal control?

Mr. WHEELER. No. I do not mean to suggest that the bill would affect our authority to manage beaches now under Federal control.

My suggestion concerning complication has to do with the diversity of interests, as your own writing on this subject demonstrates, from State to State and the difficulties we see in imposing a uniform Federal standard for this prescriptive right where land ownership patterns in the States vary so greatly.

If I recall correctly, there are differences, even in the court holdings in Oregon and Texas, the two States where there have been the most aggressive legislative enactments on this subject.

Mr. ECKHARDT. Well, the section that you refer to, section 202, must be read in terms of the qualification on line 19, that such policy shall be extended consistent with such property rights of littoral land owners as may be protected absolutely by the Constitution.

Now, would that not also be conditioned—would that not also protect, say, State operators of beaches, parks, or city operators of a beach and parks just as it would the operator of private individuals, in your opinion?

Mr. WHEELER. Yes, it would, but I think we are talking about two separate issues.

My remarks are intended to express our concern that this is an area in which it would be very difficult to achieve uniform application of a uniform prescriptive right, which the courts have held does not exist even from State to State. And I am doubtful that the Federal Government, by the enactment of legislation such as this, could establish a uniform prescriptive right.

The legal theories vary from State to State.

Mr. ECKHARDT. Let us set that aside a moment. It seems to me that is a different question.

Mr. WHEELER. Yes. it is indeed, but that is my point.

Mr. ECKHARDT. What you brought up, really, it seems to me was a fear that fragile ecological conditions on certain beaches would be overridden by legislation which talks about free and unrestricted right of the public. I want to make it quite clear, and I think the bill makes it clear, number one, that if the Federal Government owns the beach and operates it as a seashore or as a park, the controls which now exist respecting that park or seashore would not be interfered with by this bill.

Mr. WHEELER. I acknowledge that, yes, sir.

Mr. ECKHARDT. You acknowledge that?

Mr. WHEELER. Yes, sir.

Mr. ECKHARDT. Also if the State owns the beach, it is the littoral owner, and to the extent that it may, under existing law, control and regulate and limit the use of the public, this bill, I assume, would not restrict the States' rights to do so, at least that would be my thought about it.

Mr. WHEELER. I would assume that to be the intent of this provision relative to constitutional rights of property. What we are concerned about are those beaches, even in private ownership, which may have wildlife or other ecological values which would, under the provisions of this act, notwithstanding littoral ownership, be open—made accessible to the public on an unrestricted basis.

We have learned in our administration of the national seashores, for instance, that it is necessary, even at some of our most attractive beaches, to limit public access because the very presence of a lot of people would do serious damage to the resources we are trying to protect.

So what is needed is not a declaration, I would think, of an unrestricted public access to all beaches save the ownership rights which, in some ways, would be diminished by access, but a declaration that, in fact, there are values—competing values—to be resolved. It is our point of view, and I think it has been expressed by the Congress on at least two previous occasions, that the mechanism for this kind of resolution is provided by land use legislation and by coastal zone legislation where States have the initiative in planning land use.

This is a land use issue as we see it, and not one to which the Federal Government can address itself better than can the States or local governments.

Mr. ECKHARDT. I must respectfully disagree with you that this bill is primarily a land use legislation in the same sense, for instance, that the Federal Land Use Planning Legislation is land use legislation.

Actually, this bill goes more to the question of ascertaining public rights as opposed to private rights, and it goes to the question of establishing fixed policy with respect to every beach.

Do you not agree with that?

Mr. WHEELER. I would agree that there is an attempt made to delineate the public right, and I think that is an attempt that certainly we would support.

It certainly is the policy of the Federal Government to acquire lands for this purpose. I wish that in the past there had been a way less costly that outright acquisition to insure that right, but so far we have not discovered it. The clause that you referred to earlier in your bill, recognizing private rights, seems to recognize that we are talking here, not about a mere declaration, but about a fairly costly process of litigation. And that gives us cause for concern when there are alternatives. The alternatives, as I read the literature on this subject, are either subdivision control of the kind that can be applied by the State and local governments, or State legal actions of the kind that are encouraged by regulatory legislation, such as has been enacted by your State, Oregon and California.

Mr. ECKHARDT. Well, of course, in my State in 1959, the case of *Texas* v. *Luttes* determined that the State's ownership of this beach land extended only back to the point of mean or higher high tide.

That differs only from what is generally the common law rule in that the reference is to higher high tide, which more or less follows the Spanish law, and I think the same would be true of Florida and other States whose original public domain was under Spanish law, the same sort of decision has been made in Florida.

The question of public access rights arose, and the pressure began to form in direction of open beaches legislation, because the littoral owner felt that by virtue of the *Luttes* decision, he owned the land down to high tide, so to speak.

Real estate developers could sell land in West Galveston Island down to that point. And what they actually did was put possession into the sea so that a person could not drive along the beach, or use it as freely.

The question then was is it necessarily so that fee title includes a right to place restriction on public use.

Can it be said absolutely that because a man owns a beach so as to drill an oil well that he also has the right to exclude the public from the practice long exercised by the public of using the beach for ordinary recreational purposes and access to the sea?

And it was in answer to the *Luttes* case that brought the Texas legislation into being. The Texas legislation is very similar to this——

Mr. WHEELER. I have read it, sir.

Mr. ECKHARDT [continuing]. To the Federal bill.

The Texas legislation was then litigated in *Seaway Corp.* v. *Attorney General* but without really reaching the question of the presumptions of the prima facie showing of public prescriptive right or of prima facie showing of the sovereign never granting in the title right to exclude public from traditional uses of the beach.

The case never really reached those presumptions, never answered the question of whether or not these presumptions would be constitutional or could be applicable. The Court did not rely on the presumptions because it found that matter of fact, an implied dedication existed on the Galveston Beach.

And the case also said that the beach then was acquired by prescriptive right, but the implied dedication theory is probably the leading theory in that case.

After that, Oregon passed a bill almost identical to that of the State of Texas.

It litigated its beach question, and the courts went much further than the Texas court on a doctrine of ancient right and custom, customary usage.

Then Oregon repealed its earlier statute and simply put into statutory form the case law established in the Oregon case.

In the meantime, California had proceeded with two cases, although they spoke in terms of implied dedication. In all of the cases the movement was toward recognizing a distinct quality of the beach related to customary public use and related to long usage of the beach by the public.

Now, that is about all that this bill purports to address, and I cannot see, for the life of me, how this Federal land planning legislation deals with this subject, or is, in any way, in conflict.

For instance, under the Senate bill which I have, which is S. 268, there are no provisions which would require the States to develop comprehensive land use planning programs with respect to beaches that I know of, thus a State can choose not to participate in the Federal program.

There is no action which the Federal Government can take independently to insure public access to the beaches.

The Senate bill contains only the following general provision which would be applicable to beaches: One, to receive Federal funds for land use planning, the State must develop an adequate statewide land use process which includes projections of the nature, quantity and compatibility of land needed, and suitable for recreational parks and open space. That certainly does not move in any direction other than to perhaps encourage land use planning by the States.

Two, the State must establish a program to regulate land sales in development projects which will assure that open space process in valuable potential public recreation is taken into consideration, and such open space may include beaches, shoreland and wild area.

It is entirely permissible.

And, three, any method of implementation of the State plans must include the authority of the State to prohibit the use of land areas which have been designed as areas of critical environmental concern.

Now, I do not see that there is any conflict between this act and the Federal land use planning legislation, nor do I see the Federal land use planning legislation reaches anywhere near the problem that this bill reaches.

Mr. WHEELER. I mentioned the land use planning legislation because it happens to be before the House—and has passed the Senate.

However, the Coastal Zone Management Act does address more specifically the area of coastal and estuary resources, including the beaches. And in that act, the findings concerning beaches are very similar to those which you propose.

I do not think there is any quarrel about the national interest in the preservation of beaches and other similar ecological entities.

The question, it seems to me, is whether management decisions should be made by means of Federal legislation of the kind you

have proposed here, or of the kind represented by the Coastal Zone Management Act, requiring a cooperative venture between the Federal Government, the States and the local governments.

We feel very strongly that the actions taken by your State and others demonstrate that the States are perfectly well equipped to handle these situations within the framework of their own peculiar statutory and traditional legal history. An overlay of some broad Federal principle would complicate this matter considerably. There is not a prescriptive right that is recognized in the same fashion from State to State, that is recognized, let us say, in Oregon or California or Texas.

There may be other approaches in other States, including sound land use planning, which, under the Coastal Zone Management Act, contemplates protection of areas that are deemed to be of environmental concern, while allowing public access.

There are ways in which State and local governments can accommodate this need, and the point of the Coastal Zone Management Act was to encourage them to do that by prvoiding financial assistance.

Mr. ECKHARDT. But you must recognize that in the past resting altogether on State action, beach availability has dwindled, has it not?

Mr. WHEELER. Yes, it has. And that has been the rationale, I assume, for the Federal acquisition program over the years, dating back to the first national seashores and national parks. There is a Federal role here—I would not want that misunderstood, but the Federal role pertains to areas that are of national significance, those that the Congress has determined belong to all the people and should be available to all the people, for which Federal tax dollars are spent.

That is why we have just recently established national recreational areas at the two most populous centers of our country, New York and California.

There are places where State and local governments, for reasons of conflicting jurisdiction, or for lack of money, do not cope with such problems as well as the Federal Government, but I think your State, Oregon, California, and the others are all moving in the direction that this bill adopts and have demonstrated that the States can cope with this problem.

Where planning is the issue, we feel strongly the Coastal Zone Management Act addresses the problem.

Mr. ECKHARDT. Let me state to you what I think this bill does, and if you disagree with that, I would like your comments and also I would like to have you respond as to whether or not this seems to be a practical approach.

As I see this bill, all it does is say to the States—

We hope you move in the direction of protecting your beaches. If you do so to the fullest extent available in law, you will be entitled to a preferential treatment with respect to Federal grant, 75–25 matching.

But the bill does not contain any compulsion on either of the States or the Federal Government to buy any land.

It simply gives an option, after determining that the beach may not be obtained as a matter of right for the public under the standards set out in this law, to proceed in the same proceeding to condemnation ,but I must respectfully disagree with your construction that this compels a State to purchase land with which the Federal Government elects to condemn because in section 206(b), on page 7, beginning on line 11, it says:

> In order that such interest be recovered through condemnation, the State must participate in acquiring such interest by providing matching funds of not less than 25 percentum of the value of the land condemned.

Now, if the State does not want to do this, then the interest cannot be recovered by the condemnation.

You simply walk out of the suit and say the littoral owner title has been established.

Now, that is the way I read the bill, but if you find that it should read differently, I would recommend that, or urge that you recommend some amendment to take care of that.

Mr. WHEELER. We may not be addressing the same point, although the one you raised is a matter of concern.

I am not concerned that in some way this bill would interfere with the Federal Government's authority to acquire, by condemnation, and clearly we are going to have to continue to acquire by condemnation where that is the only means to acquire beach front property.

As I mentioned during the course of my statement, we wish very strongly that there were some less expensive ways to acquire public access to ocean front property on the coast of the United States. We have not so far discovered that method.

More power to the States if they can make effective use both of the prescriptive right and right to access, but on the question of compulsion, it seems to me that the determination concerning actions brought to assure access lies solely within the prerogative of the Secretary of the Interior.

Once having commenced that action cognizable in the District Court, he is required to pay, presumably, 75 percent.

Mr. ECKHARDT. That is the way you understand the bill. It is not the way the bill is intended, and the bill would certainly be amended to take care of that.

As I read the bill, and as I conceived it, the bill simply says, No. 1, that States are encouraged to act as, for instance, Texas and Oregon have acted in order to protect their beaches, if they do, their laws will be enforced and they may be enforced, not only by their Attorney General, but by the Justice Department of the United States; that both the States and the Federal Government will move as far as they can to protect the public right within constitutional restraints and, of course, in accordance with the varying land law of the various States—imposed upon that a general question of Federal policy.

Now, it does not say that condemnation must follow a suit which is, in effect, an action of trespass, to try title.

The State enters into that suit with the aid of the Federal Government, or the Federal Government initiates the suit. And let us

assume that it is determined in that particular instance the law of the State permits, say, John Jones, who owns littoral property, and who has fenced it off and uses the Gulf of Mexico as his easement—it was always used that way and always excluded the public—and the court decides that to be the case and, therefore, determines that he not only owns the fee title to the land to the point of higher high tide, but he also has the right of exclusion of public because the two presumptions have not been satisfied.

He has rebutted a presumption of prescriptive right in the public, and he has rebutted a presumption that the grant restricted him.

Now, if that is the decision and the State and the Federal Government loses the suit, either the Attorney General of the United States or the attorney general of, say, Texas can say, "That is as far as we want to go. We do not want to buy the right to use that beach front."

And either can negatively move forward in a condemnation suit.

That is the way I understood it.

Mr. WHEELER. I do not think we have a disagreement then on the meaning of the bill as we read it, and perhaps, Justice will be able to clarify this point tomorrow, but section 204(a)(3) clearly includes, within the authority provided to the Secretary and to the Attorney General, the authority to condemn these easements.

I guess there is no question about that.

Mr. ECKHARDT. That is right.

Mr. WHEELER. And the sole determination as to who proceeds in what fashion to condemn those is given to the Secretary in Section 207: he "shall determine what actions shall be brought under section 204 thereof."

There is no mention here that he makes that determination in concurrence with the State attorney general or the State authorities in any fashion. Section 206(b) requires then that any easement so condemned must be paid for, partially by the State, to the extent of 25 percent.

Mr. ECKHARDT. You are referring to line 20 on page 7 which says, "the Secretary shall administer the terms and provisions of this title, and determine what action shall be brought under section 204 thereof?"

Mr. WHEELER. Yes, sir. He will determine whether or not to seek the public easement, and he will determine whether or not to acquire by condemnation.

Mr. ECKHARDT. Well, I respectfully disagree with you on that, and if the language of the bill would lead to that conclusion, I would welcome language which would make that point clear.

The reason for section 207 is to provide that the Secretary shall be the determining factor with respect to whether or not an action is brought under section 204.

In other words, if a State has not been the moving party, the Secretary may move without getting the State to join in, but the thing is that he may not commit the State's contribution, because in secion 206(b) it is provided that "in order that such interest be recovered through condemnation, the State must participate * * *"

Now, that is not commanding the State participate, but if the State does not participate, one may not move to point three on page 6, line 9.

The Secretary can only move to establish the protection of the public right to determine the existing status of a title.

Now, the reason that three is put in there is to prevent this rather complicated situation.

For instance, one goes in to bring an action for trespass to try title to establish and protect the public right to beaches. You get through this whole suit. You have tried the whole matter, and gotten all these facts before the court. You have gotten a determination by the jury, and et cetera, and ultimately the case goes in favor of the littoral owner——

Mr. WHEELER. Notwithstanding the declaration of Federal policy that we are attempting here to impose?

Mr. ECKHARDT. Yes, because if in fact the presumptions are overturned, as they are set forth in section 205, if they are overturned, the littoral owner has the title to the land, and is entitled to exclude the public.

Mr. WHEELER. Could I interrupt you?

Mr. ECKHARDT. If we did not provide three, that suit would then be final and determinative in favor of the littoral owner, and one would have to go in one separate—in another action to condemn.

The only reason for three is to provide a means by which first the title can be determined, and then there can be an election with the agreement of both the Justice Department and the State attorney general to proceed to condemn, but only if both agree.

Now, if that is not the effect of that language, that is what is intended, and I would invite an amendment on that point.

Mr. WHEELER. Do I understand you to say that you do not read section 207 as pertaining also to 204(a)(1), pursuant to which the Attorney General is authorized to protect the public right to beaches, and that those actions would be subject to control by the Secretary of the Interior?

Mr. ECKHARDT. Well, I would say this, that I would not consider this added language to change the bill, but I would not oppose the addition of the language to 207, to state that the Secretary shall administer the terms and provisions of this title, and shall determine what action shall be brought under section 204 hereof, but with respect to condemnation under section 204(3), there must be the concurrence of the State before the Secretary may move, because I think that the intent here where we say in order that such interest be recovered through condemnation the State must participate, is to give both the State and the Federal Government the veto of any provision that would commit either State a Federal fund, which I think is perfectly proper.

Certainly, you do not want the Federal Government to be able to commit State funds against Federal funds?

Mr. WHEELER. Definitely not. That was the point we raised, Mr. Chairman. I entirely agree on that question of policy, and if that is not covered here, and if there is a conflict between sections 207 and

206, it should be resolved in favor of the right of the State not to participate.

Mr. ECKHARDT. Would that apply also to action under section 204 (1) and (2), relative to these actions to establish the public right in the first place, and apparently acquire title action of the kind described by subject two?

You feel that those two ought to be decided jointly?

Mr. WHEELER. No, sir, because neither (1) or (2) can commit funds for purchase of land.

Mr. ECKHARDT. One and two addresses themselves altogether to the question of establishing title.

Now, I would assume that the Justice Department would be most reluctant to move under 204 (1) and (2) without participation by the State, but I have not limited it to that.

For instance, there may be a very important seashore used by persons of two States, for example, in a situation involving, Rhode Island and New York and New Jersey, where there is an overriding national interest involved, but without concern for the people who use that beach who may come from another State, one State simply elected to keep the beach as more or less exclusive.

You have a case very much like that in New York involving the city of Long Beach.

The city of Long Beach wanted to keep that beach as an exclusive beach, and wanted to charge persons from outside the city of Long Beach a greater amount of money to use the beach—a greater use fee, or to exclude them altogether, I think alternatively, and to afford the beach only to the citizens of that city, and the results of the case was to find that the city of Long Beach made the implied dedication of that beach for general public use and could not withdraw it.

Very much the same situation was involved in a New Jersey case in which the theory of public trust was brought into consideration, but if we leave the veto power to the State altogether, we could run into the same kind of restrictive attitudes on the part of the State which we find in the case of some of these communities.

Mr. WHEELER. You are suggesting then, in the case of Long Beach, for instance, should those party plaintiffs not have prevailed under State law, and in State courts, this would then be a matter of concern to the Federal Government: that the Federal Government would enter as a party plaintiff against the city of Long Beach to enforce the rights of all citizens of the United States, not just the people from the adjacent towns, or another area of New York State.

Mr. ECKHARDT. Sure, that would have been a possibility.

Mr. WHEELER. Certainly, that is what your bill intends?

Mr. ECKHARDT. Yes, to give the State and the Federal Government standing in court to bring such actions on behalf of the public.

Actually, of course, in the comparable bill in the State of Texas, that is precisely where the Attorney General got standing to go into the *Seaway* case.

Mr. WHEELER. This bill does not provide State standing as I read it. This has to do solely with Federal standing in Federal courts.

Mr. ECKHARDT. That is right.

I hardly think it only has an indirect effect on State standing. I frankly do not know what the result would be if a State went into a Federal court asserting a Federal right in protecting a Federal right. That one is a rather complicated question of standing, but as a practical matter I would doubt the State would go into Federal court protecting a Federal right, unless it was a State statute authorizing the Attorney General to so act, but that is a matter that I think the State should determine.

Mr. WHEELER. Well, I could not agree with you more, and I think that that is the reason for what I sense to be a fundamental difference here—whether or not the States can appropriately and successfully afford the same remedies to their citizens that this bill would afford. In other words, what is to be gained by reiteration of a Federal interest and involving the States in these kinds of procedures when Federal dollars are available to the States now under existing legislation and a national policy of concern has already been expressed. What more is gained by this Federal statement of purpose and by Federal prohibition against construction on all beaches as your bill provides.

Why are the States not competent to handle this problem in light of what we see as a very strong trend in that direction?

Mr. ECKHARDT. Well, you said a strong trend. What we have is New York—one case in New York of importance, that is, the city of Long Beach case.

We have one case of importance in New Jersey. We have a case in Florida. We have two cases in California, and we have a case in Oregon. In addition, Texas, of course, has the *Seaway* case, but in addition to these States, you have got the very long beach line of Maine, which is very long, and the New England States, and other than New York and New Jersey, you have most of the Southern States with virtually no law.

There is virtually no definition of what constitutes a beach in the law of any State, except in the case of Texas, and in the case of Oregon.

Mr. WHEELER. Are you convinced, and I ask this with due respect, because we have had discussions with the Justice Department on this issue, that the Federal Government can provide those kinds of definitions, let us say, for the State of Florida, as this bill would attempt to do?

Mr. ECKHARDT. Yes, to the extent that this bill does it, but of course, the bill does it in deference to constitutional rights which may arise and be affected by State law.

Mr. WHEELER. So then, to the extent a landowner can prove his interest pursuant to State law, the bill does not accomplish what you hope it would, that is to say, that there is a prescriptive national interest.

Mr. ECKHARDT. Well, there are two ways in which the Federal law would in effect move toward protecting the beaches—really three ways.

One, of course, is to give a directive to the Justice Department to defend the public right, whatever it is.

No. 2, to establish an overriding total Federal policy which I do not urge can override constitutional right to the use of the land. It can only be considered as a part of the entire structured law in which this question is determined.

And, No. 3, a procedure by which one does not have to go in, for instance, and prove that the original grant provided this or that—and incidentally, we have before this hearing the original grants of all of the lands bordering on the open beaches in the State of Texas.

The definitions are very, very imperfect as far as describing what the grants cover.

Now, those three things are done by bill, and to that——

Mr. WHEELER. By the presumption, primarily?

Mr. ECKHARDT. Yes.

Mr. WHEELER. Do you see any difficulty in the constitutionality of those presumptions?

Mr ECKHARDT. No, sir. This question was raised originally in connection with the Texas act. This matter was rather formally discussed, because it was sent to the Attorney General, and I happened to participate in the discussion with Will Wilson, late of the Justice Department, who was at the time, Attorney General of Texas.

He called in Page Keeton, Dean of the University of Texas Law School, and he invited a man on his staff by the name of Rogers and myself to participate in a very informal discussion of this thing.

The point that Rogers made, as a very strict land lawyer, was that unless a presumption has a relationship to the fact involved, unless the presumption was really meaning to attempt to create a presumption, to weigh the ultimate determination in favor of one party or another constitutes a denial of due process, and he pointed out in an old case in Georgia, the presumption in the Georgia law was against the railroad train when it struck an automobile on the highway.

The court said that kind of presumption denied due process of law to the railroad company, and that there had to be a relationship between the fact upon which the presumption was based to the ultimate result, or the side weighed in favor of the presumption.

Well, I think all of us conceded the fact that the beach was a beach, and the relationship that exists between that fact and the use of the beach historically constitutes a reasonable basis for a presumption.

Now, we very cautiously wrote the act—this Federal act is written the same way in terms of prima facie showing so that we are not really saying that we are weighting the scales so that they would overcome positive evidence to the contrary.

We simply say the presumption is a change of the burden of going forward with evidence, but this is extremely important when one is dealing with the question of how beaches have been used for the last 100 years, because it is very difficult to bring in any evidence concerning what happened 100 years ago.

Mr. WHEELER. I would certainly agree that the value of the presumption in this case would be beneficial to the plaintiffs attempting to establish a public right.

Is, in your judgment, the validity of that presumption equally applicable in every State?

Do you have the same validity, let us say, in Alaska, where there is no tradition of public use?

Does that presumption in that State stand the test of reasonableness or due process?

Mr. ECKHARDT. I do not know if it stands the question of reasonableness.

The question of whether or not the ultimate result would be in favor of the littoral landowner or the public might differ between States, considering traditional States, but now we have got the States with such a different basis of title as, for instance, Oregon and Texas.

In Oregon, the law of most beaches essentially is based on initial U.S. possession of the land with the grant from the United States, whereas, in Texas there are several bases, but none from the United States, no grant from the United States—either from the Kingdom of Spain or from the Republic of Mexico or the Republic of Texas, or ultimately the State of Texas, because Texas maintained its own public domain, and yet we get almost the same attitudes on the part of the courts with respect to the question of the use of the beaches, and in both of those cases we come out with essentially the same result.

Mr. WHEELER. With presumption in both States, as a matter of State law?

Mr. ECKHARDT. That is right.

Well, of course, actually the presumption question was not really reached in each case.

The Texas case was based on a factual determination of use of the beach, and really that was pretty much the basis of the Oregon case.

The theory of law was somewhat different.

Mr. WHEELER. The theories do vary in these cases.

Mr. ECKHARDT. But there is a surprising similarity in the result, and in the attitude toward public use of the two cases.

Mr. WHEELER. In preparing for our discussion this morning I had occasion to read the Stanford law review article that you may have seen, 2 or 3 years old now, I guess, and it tended to sustain our belief that the States are equipped, if these cases are any indication, to cope with the problem. Where a State may have inadequate sensitivity to move in this direction, the Coastal Zone Management Act, and indeed our proposal for land use planning, would provide encouragement to the States. This is a matter that the States can and should address.

I think there is no question about that.

I think our major difference is whether or not it is a matter that the Federal Government ought to address, and whether in doing so the Federal Government accomplishes very much at all in light of the differences from State to State.

Mr. ECKHARDT. I am familiar with that Stanford article, which is a very good one, and I think I cited it in the law review article I wrote in the Summer 1973 Syracuse Law Review.

I found a remarkable similarity in attitudes against the background of quite different law.

I would invite your attention to that more or less updating of authorities on the matter.

Mr. WHEELER. I think it is. I agree with you that, first, it is an excellent article, but second, that notwithstanding the various theories, notwithstanding the various sources of title, the result is generally the same, and the conclusion of the article is that there is definitely, as I read it, a trend in the direction you seek here.

Mr. ECKHARDT. There is a tendency in the direction of some uniformity of concept of beach usage, and it would seem to me that if a Federal act is deferential to the law of the State, but purports to bring uniform process and sharpened attention, and creates the machinery for protecting the public right, it seems to me that that does not fly in the face of the developing State law.

It rather augments it. That is the attempt here, at any rate.

Furthermore, there has been some tendency on the part of the States to move very slowly legislatively and judicially in establishing these rights, and the Federal act that we propose here would create an incentive for the States to move a little bit faster, because in the event that they moved as fast and as far as they can, they get a little boost that they would not get by virtue of their alternative protection of their public right.

Mr. WHEELER. That is exactly the same theory that this committee adopted in the coastal zone legislation, and I think Mr. Knecht, from the Department of Commerce, can tell you that there is considerable interest on the part of the coastal States in doing just that.

We are delighted, and this is the same philosophy embodied in the comprehensive land use legislation as well.

I just do not think we have a disagreement in principle here.

Mr. ECKHARDT. Mr. Kyros?

Mr. KYROS. No questions.

Mr. ECKHARDT. Do you have anything further?

Mr. WHEELER. No, I do not, sir.

Mr. ECKHARDT. Mr. Potter?

Mr. POTTER. Mr. Wheeler, in your statement you indicate that you apprehend some problems if in fact the public were given unrestricted access to the beaches: Problems having to do with protection of the fragile shore environment.

I realize we are talking about that narrow strip of beach between high water and the line of vegetation, and realizing also——

Mr. WHEELER. Or where no such line exists, 200 feet inland, as I understand the bill.

Mr. POTTER. Right. Realizing further that we are talking not about titles so much as we are talking of you might call right of innocent passage, I would like to know what are the nature of the ecological problems that might be present?

Mr. WHEELER. Twofold, I would suggest, and we have touched on this just briefly earlier.

One, access itself—a right-of-way concentrated in a fairly narrow area, for example, the easement area, unrestricted access would tend to destroy dune vegetation, or whatever vegetation happens to exist from the point of access.

But, second, I think you encourage, as is clearly the intent of the bill, increased public use of the common area, and we suggest that in some cases that kind of use just cannot be sustained.

We have learned in many cases, with which I think you are probably familiar, that even at national seashores acquired for public use, it has been necessary to restrict that use, and indeed, to restrict access.

Mr. ECKHARDT. On this point, Mr. Wheeler, under the Texas law, in which there has been considerable practical experience in an act of this type, it has been construed that there is no limitation on a county, for instance, to regulate the manner in which the beach is traversed.

The only thing that it guarantees is personal access. For instance, automobiles could be prevented from going on the beach, and I must admit that the Texas law addresses that point specifically.

The reason it is not addressed here is because it would seem to me to be best for those kinds of questions to remain within the regulations of the State.

Of course, in this act, if lands are acquired, it provides that the State then shall control, but I do not think there is anything in that act that would command a State not to enact regulatory legislation with respect to the manner by which a beach is traversed, and only the State laws which exist, or a considerable regulation in that regard can be brought about, and I think it is quite desirable.

For instance, it might be that a State would desire to prevent any vehicle from going on the beach and to thus afford parking areas behind the beach with access by access roads, and with approaches at intervals.

In fact, the original version of the Texas House of the beach bill included a specific provision that such access could be the exclusive access to a beach, if there were an access within a certain distance at intervals along the beach, and that vehicles could be absolutely prohibited from use of the beach.

I would hope that this bill would not prevent a State from enacting such legislation.

Mr. WHEELER. On the other hand, we have concern that it does not require such regulations.

Mr. ECKHARDT. It does not speak one way or the other to that question.

Mr. WHEELER. That is right, and the Federal contribution to the extent of 75 percent might be spent in a way we deem not to be in the national interest.

In fact, I would suggest that in some cases, regulations should include complete denial of access where we have, for instance, as we have found on Cape Cod, nesting colonies of important birds that would be disturbed by the first person coming into a particular area, or the Everglades.

Mr. ECKHARDT. You mean no human beings?

Mr. WHEELER. Yes, sir.

Mr. ECKHARDT. Not even naturalists?

Mr. WHEELER. Naturalists by permit, but that is not public access within the meaning of this bill. I thought we had already dis-

cussed that question. If you control biological areas—areas on the beach, and would be able to control as we do now, this bill would affect only some one who privately owns the beach and who purports to act for the public in denying access to an area of environmental concern.

Of course, as has been pointed out here, the area of concern would be essentially the area between the dunes and the point of high tide.

A private owner could protect anything behind the dunes, in any way it wants to. Today, you cannot exclude the public from the foreshore. The foreshore is, in most areas, recognized as being within the public domain, except I think in New England, where there may be a different rule.

Mr. ECKHARDT. Mr. Rogers?

Mr. ROGERS. I am sorry I was detained in coming.

May I just ask, is the Department's position that the legislation—are you favorable to the legislation?

Mr. WHEELER. No, sir.

Mr. ROGERS. What is the basic position?

Mr. WHEELER. The position is that what could be accomplished, assuming that we are able to overcome the legal obstacle that Justice will address tomorrow, has already been accomplished, and that land use decisions are best left to the States and local government, with assistance from the Federal Government as is now provided by the Coastal Zone Management Act.

Mr. ROGERS. By the Coastal Zone Management Act?

Mr. WHEELER. Yes, sir.

Mr. ROGERS. You think that was a sufficient authority?

Mr. WHEELER. Combined, yes, with the State actions that are now being taken to protect a right of public access.

Mr. ROGERS. Thank you, Mr. Chairman.

Mr. ECKHARDT. Thank you.

Thank you very much.

Mr. WHEELER. Might I say that I have been quite enlightened by this discussion, and I have enjoyed it very much, and I thank you for your indulgence.

Mr. ECKHARDT. Thank you.

Our next witness was to have been Mr. Busterud, Council on Environmental Quality, who is not here at this time. This leaves us with an opportunity to let Mr. Lee Johnson, the attorney general of the State of Oregon, appear now.

He has come a long way. He has a tight schedule, and we might get caught in some of the operations on the floor this afternoon.

STATEMENT OF LEE JOHNSON, ATTORNEY GENERAL FOR THE STATE OF OREGON

Mr. JOHNSON. Thank you very much, Mr. Chairman.

Mr. ECKHARDT. I want to say that we are most pleased that you have come all this way to testify here.

I certainly recognize that your State has, shall we say, stretched the law in favor of the public, perhaps further than any other

State in the Union, and I am sure this must be to good extent by your resources.

Mr. JOHNSON. I think we are, to an extent, on a par with Texas.

Mr. Chairman, I have submitted to the committee a more detailed statement than I intend to make this morning, tracing some of the historical developments in Oregon, which I think is very unique, and some of your comments earlier, I think, are very appropriate.

Mr. ECKHARDT. Mr. Attorney General, would you care to speak, or to summarize, and speak extemporaneously, and have the right to put your total remarks in the record?

Mr. JOHNSON. That is what I more or less intended to do, yes.

Mr. ECKHARDT. Without objection it will be so ordered.

[The statement referred to follows:]

STATEMENT OF LEE JOHNSON, ATTORNEY GENERAL OF OREGON

BIOGRAPHY OF MR. JOHNSON

Mr. Johnson is particularly well qualified to speak on the subject of open beaches. In 1967, as a member of the Oregon House of Representatives, he co-authored the Oregon Beach Bill. He thereafter served as chairman of a legislative interim committee which wrote the refinements to the Beach Bill enacted in 1969. At Attorney General, Mr. Johnson has been in charge of the litigation that has arisen under this bill, particularly the leading Oregon cases, *State ex rel Thornton* v. *Hay*, 254 Or 584 (1969), *State Highway Commission* v. *Fultz*, 261 Or 289 (1972), and *State ex rel. Johnson* v. *Bauman*, which is presently pending before the Oregon Court of Appeals.

Mr. Johnson is a graduate of Princeton University (A.B. 1953) and Stanford University Law School (LL.D. 1959). He served as an antitrust attorney with the United States Department of Justice in Washington, D.C. from 1959 to 1961 and subsequently was in private practice in Portland, Oregon from 1961 to 1969.

He served two terms as a member of the Oregon legislature and was chairman of the House Committee on Taxation and the Interim Committee on Highways. He was elected Attorney General in 1968 and re-elected in 1972.

PREFACE

This measure, taken as an expression of concern that there is not at present a fully articulated national policy with respect to the preservation of the public's access to our national seashores, is laudable. But several considerations arising out of Oregon's practically unique experience in this area lead me to believe the Bill has chosen the wrong means to desirable end.

THE STATE OF THE LAW REGARDING OPEN BEACHES IN OREGON

The history of public ownership of the beaches in Oregon is probably unique. Until the mid 1960s, it was almost universal public opinion that the Oregon beaches were owned by the State. This assumption was premised on the fact that the state, by virtue of the 1856 Admissions Act, owned all submersible lands in the state. In order to preserve public ownership of these lands, Governor O West initiated in 1913 a measure which declared the submersible beach lands a state highway. More Oregonians, including Governor West and the legislature, believed that this action had the effect of permanently preserving this valuable scenic and recreational asset for public ownership. However, as a matter of fact, the state's ownership only included those lands west of ordinary high tide, often referred to as the "wet-sand" area, and that the abutting landowners owned the remainder. See *Borax, Ltd.* v. *Los Angeles*, 296 US 10, 56 S Ct 23, 80 L Ed 9 (1935). This meant then that on many of the Oregon beaches, there was a considerable area of the beach, often referred to as the "white-sand" area, which remained in private ownership. The public did not become aware of this deficiency in public ownership until

the mid 1960s. As a consequence, in 1967 the legislature enacted the Oregon Beach Law which was premised on two principles: (1) There was a common law precedent for asserting that the public had acquired a recreational easement over the white-sand area by virtue of the legal doctrines of prescription, dedication or custom. The leading decision on this subject at that time was a Texas case, *Seaway v. Attorney General*, 375 SW2d 923 (Tex. 1964) in which the court held that a public easement had been acquired to the beaches on the Texas coast by virtue of implied dedication. Under the Oregon Beach Bill, the State Highway Commission was given authority to assert any easements that the state might have. However there was considerable skepticism on the part of many legislators and lawyers in the state as to whether the state would be able to establish easements under any of these common law doctrines. For example, the state of Washington had been unsuccessful in asserting any common law easements to the beaches in that state in the case of *State ex rel. Shorett v. Blue Ridge Club*, 156 P2d 667 (Wash. 1945). (2) In view of the concern as to whether the state could assert such easement, the Oregon Beach Bill provided for an alternate means of protecting the beaches by use of the state's police power and zoning the beaches. Under these provisions, no one was permitted to erect any kind of structure on the beaches without obtaining a permit from the State Highway Commission.

The principle test of the Beach Bill came in the case of *State ex rel. Thornton v. Hay*, 254 Or 584 (1969), which was a far-reaching decision. The court held that the state had acquired a recreational easement to all of the Oregon beaches. In that case, the court discussed both the doctrines of implied dedication and prescription. The court by implication rejected the doctrine of implied dedication because of the unique situation in Oregon where most of the property owners, as well as the general public, had operated on the assumption that the beaches were in public ownership. Under these circumstances the court determined that it would be difficult to construe that there was any intent manifested by the landowners to dedicate property which they didn't even know they owned. The court did indicate, however, that there was a good possibility the state could establish such easements by way of prescription because public use of the beaches had been "open, adverse under claim of right, but without authority of law or consent of the owner" for a period in excess of 60 years. However, the court did not rest its decision prescription, but rather based its decision on the English doctrine of custom. It's reasoning is succinctly stated in its opinion:

"Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly.

"The other reason which commends the doctrine of custom over that of prescription as the principal basis for the decision in this case is the unique nature of the lands in question. This case deals solely with the dry-sand area along the Pacific shore, and this land has been used by the public as public recreational land according to an unbroken custom running back in time as long as the land has been inhabited."

The court set out seven requirements that had to be met in order to establish custom and found that in the case of the Oregon beaches, all of these requirements were fulfilled. Those requirements are:

1. The public use must be long and general, presumably for a period far in excess of the statute of limitations.
2. The public right must be exercised without interruption.
3. The customary use must practicable and free from dispute.
4. The use of the land by the public must be appropriate to the land and the uses of the community. The court pointed out that appropriate uses had in the past been prohibited by municipal police agencies.
5. There must be certainty in the boundaries of the area covered by the custom.
6. The custom must be obligatory in the sense that it is not left to the option of each landowner whether he will recognize the public right of access.
7. The custom must not be repugnant to other customs or other law.

This decision by the Oregon Supreme Court is somewhat unique, and as indicated by the court decisions in the state of Washington, there is no assurance it will be followed by other courts in the nation. There is not a great deal of common law precedent for the decision. The court relied pri-

marily upon Blackstone. The only U.S. court decision to support the holding was an 1834 decision by the New Hampshire Supreme Court.

The Supreme Court of Oregon did not have to reach the question whether the zoning provisions of the beach law were constitutional because of its finding that a common law easement would in fact exist. As a consequence the zoning provisions in that law are now mere surplusage. However, they were significant at the time and it was the first time the state of Oregon, or for that matter most other states, had passed any statute calling for statewide zoning.

Following *State ex rel. Thornton* v. *Hay*, 254 Or 584 (1969), Mr. Hay filed a lawsuit in the United States District Court challenging the constitutionality of the Oregon Supreme Court's decision, alleging that the court's decision was an unconstitutional taking of property. A three-man panel was convened and the court unanimously upheld the Oregon Supreme Court. Mr. Hay did not appeal the three-man panel and the matter is now final as far as the state of Oregon is concerned. The net effect of this decision is that the state has acquired a public recreational easement to all of the beaches along the Oregon coast.

The principle question that was unanswered by the *Hay* decision was how far inland these recreational easements would extend. There are many portions of the Oregon Coast which are lowlands adjoining the beaches which can best be described as sandy dunes. There has been a long-standing tradition of public use of these dunes areas for recreational purposes identical to the public use of the beaches. Accordingly at my initiation, the state has instituted a proceeding involving a specific piece of dunes property near the city of Cannon Beach, Oregon. This is a test case to ascertain whether these public easements extend beyond the natural vegetation line on the Oregon Coast. This is the case of *State ex rel. Johnson* v. *Bauman*. The Circuit Court held that the state had not acquired such an easement and the matter is now on appeal to the state Court of Appeals, our intermediate appellate court in Oregon.

STATUS OF PUBLIC DEVELOPMENT ALONG THE OREGON COAST

With the passage of the Beach Bill in 1967, the State Highway Commission, through its Parks Division, has considerably accelerated its program of developing parks, parking and access along the Oregon Coast. The state now operates 76 parks constituting 30,547 acres along the coast. Indeed you cannot drive more than 21 miles along the Oregon Coast without coming to a state park. In addition, the Highway Commission has built access roads to the beaches at intervals of three miles. This program is 70% complete. These access roads also include parking facilities. In conjunction with the construction of access roads and parks, the Highway Commission has prohibited the driving of vehicles upon the beaches except for emergency and gathering firewood during the winter months.

The principal problem that remains on the Oregon Coast is the protection of the upland areas. In recent years we have seen a tremendous increase in development of motels, condominiums and attendant facilities along the coast. Most of this development has been uncontrolled. Many of the coastal communities have indeed encouraged development without regard to the future impact on the invironment or even the communities' present ability to absorb this impact.

In 1971 the legislature established a Coastal Conservation and Development Commission which is charged with the responsibility of developing an overall master plan for zoning the Oregon Coast, and hopefully this will lead to more adequate planning. It should be pointed out that we are probably fortunate in Oregon that, even with respect to the uplands, there are already some built-in protections. The state and federal government together own 51 percent of the upland area. I have already mentioned the extensive state park system. There is also a network of parks maintained by the United States Forest Service and now the development of the dunes area along the Southern Coast by the National Park Service.

OTHER DIFFICULTIES THAT HAVE ARISEN BECAUSE OF THE OREGON BEACH LAW

While the *Hay* decision was a great victory in establishing public rights on the Oregon beaches, it has led to some dilatory concerns by landowners

throughout the state. Most property owners on the Oregon Coast accepted the decision with favor, as it related to the beaches themselves. However, the *Bauman* case mentioned above has raised concern as to how far these public recreational easements are going to extend. Oregon also has vast amounts of private ranch and timber land which has been used by Oregon citizens for recreational purposes, usually without objection of the landowner. As a result of the *Hay* decision, many landowners, in order to protect their property rights, have resorted to posting or fencing their property and thus limiting public use. Most of these landowners would otherwise welcome public use if their ownership rights were not threatened. The 1973 legislature recognized this situation and with my support enacted House Bill 2583, Oregon Laws 732, which in effect provides that the public cannot acquire any future rights in property by prescription, dedication, custom or otherwise resulting from recreational use of the property. This bill specifically provides however that it does not affect any pre-existing right the public may have acquired in the past. The purpose of this bill is, of course, so that landowners can now permit the public to come on their land without losing any of their ownership rights.

COMMENTS ON H.R. 4932

It appears that the principal provision of H.R. 4932 is Section 204, which empowers the Attorney General or the U.S. Attorney to initiate litigation to establish public easements and to exercise the power to condemn such easements where necessary. In other words, the U.S. Attorney General would be given comparable authority to that of our State Highway Commission under the Oregon Beach Law. In Section 202, the bill states: "It is the declared intention of Congress to exercise the full reach of its constitutional power over the subject", i.e., beach lands throughout the United States. It is my opinion that Section 204 (A) is of very doubtful constitutionality in that Congress would be interjecting itself into an area of jurisdiction which is reserved to the states under the 9th and 10th amendments of the United States Constitution. It should be emphasized that the type of public easements which have been established in Oregon, Texas and in a few other states are common law "public" easements. Such easements where they exist do not belong to any agency or government, but rather belong to the public at large. The general doctrine is that such easements can be asserted by any member of the public who is affected thereby, or by a governmental entity that has sovereignty over the lands in question.

It would appear that only the states or their subdivisions have sufficient sovereignty to assert such a public right. The federal government has no sovereignty over these lands. The lands certainly are not part of the federal domain. Indeed, it is clear under the Admission Acts of most states that the submersible tidelands are owned by the states, not the federal government. Congress does, of course, have the power to regulate interstate commerce, but the relationship of interstate commerce to beach lands seems tenuous at best. Even if there is such a relationship, it is doubtful there is a sufficient tie to give the federal government the sovereignty to claim these easements. The same argument would exist with respect to condemnation, although a stronger case for federal jurisdiction may exist.

It should be remembered that the question of real property ownership must be determined under state common and statutory law rather than federal law. Thus, even if Section 204 were constitutional, the federal courts would be placed in the difficult situation of trying to ascertain what the state law is. While the federal courts are often in this position in actions involving diversity of citizenship, the practical problems presented here would be considerably greater. Most jurisdictions do not have any high state court adjudications of the issue. As a consequence, the federal courts would be placed in a position of trying to guess what a State Supreme Court might ultimately hold. Such a situation would be untenable, particularly in the area of real property law where it has been uniformly recognized that certainty of the law is essential.

Section 205 of H.R. 4932 likewise raises serious constitutional questions. This provision creates a rebuttable presumption that the public has acquired a prescriptive right to beach lands. While it could be argued that the section is only procedural, it seems quite clear that it would effect the substantive

rights of the land owner. It is my opinion that the section is unconstitutional on two grounds. 1) Congress does not have the authority to change state common law relating to real property. 2) The section would amount to an unconstitutional taking of property in derogration of the Fifth Amendment. The universal common law rule is that there is a presumption in the law favoring the person who holds the title ownership and that the doctrines of adverse session, prescription, dedication and custom are exceptions to that rule. The burden of proof is upon the person asserting the exception rather than on the title owner. To shift the burden would make it almost impossible for the title owner to protect his rights. It is true that the State of Texas has a law which does provide for a similar presumption and that that statute was upheld in *Seaway v. Attorney General*, 375 SW2d 923 (Tex. 1964). However, this is the only authority supporting such a proposition and it seems inconceivable to me that many jurisdictions would follow the Texas case.

Speaking for the state of Oregon, we are also concerned with the possibility of overlap and duplication of jurisdiction that would result if H.R. 4932 passed in its present form. As I stated, we have already established public easements to the beach lands throughout the state. Furthermore, the state has launched on an extensive program to provide access and to accomplish the other objectives set forth in H.R. 4932. We already have within the state some overlap of jurisdiction between the local and state governments. If H.R. 4932 passed, it would superimpose over and above the state program, the U.S. Department of Justice and the U.S. Department of Transportation. In addition, the state has had to work closely with the U.S. Forest Service and the National Parks Service which presently owns a considerable amount of public lands along the Oregon Coast. Frankly, the addition of two more federal agencies into the picture simply will result in a jurisdictional morass.

I think I should also point out one other criticism of H.R. 4932 and this relates to the definition of the line of vegetation. This was an issue that the Oregon legislature confronted in 1967 and 1969 and caused considerable difficulty. It is my understanding from the discussions with geologists and oceanographers that there is such a natural line and that it can be discerned by an expert in the field. However, experts often disagree over the exact location of such a line. When we are talking about trying to determine the boundary lines between private and public ownership, it seems to me that certainly is a very important element. Likewise, it is important that such a line should be determined in a relatively easy manner. An abutting private landowner should be able to know where the limits of his property are without having to employ the expert services of a geologist or oceanographer. It was for this reason that the Oregon legislature used a legal description for determining the vegetation line, rather than an inexact line based upon geological findings. In the bill passed in 1967, the legislature adopted a contour line measured from ordinary high water. During the two years interim the Highway Commission was directed to make an aerial survey of the Oregon Coast and from that survey an exact legal description line was drawn down the Coast. I have enclosed a copy of a photograph which is an example of how that line was drawn. It is my recommendation that should the Congress decide to pursue the course set forth in H.R. 4932, it use a precisely defined line. It would appear that the definition contained in Section 201 (3) (A) does not meet that specification, but that the definition in sub-paragraph (B) does meet that requirement.

A final objection I have to H.R. 4932 is to those provisions relating to financial assistance to the states for acquiring public beach lands and access thereto. The concept of assistance in this area, I think, is very desirable and probably necessary. However, as written, the bill is discriminatory against states like Oregon which have already accomplished most of the objectives set forth in the bill. I mentioned our beach access and park program which was undertaken primarily at state expense. We have on occasion received assistance from the federal government and particularly from the Land and Water Conservation Fund provided for under Public Law 88-578 enacted in 1964. Recently the state, with 50 percent matching funds from the Land and Water Conservation Fund, acquired a parcel of property along the Oregon Coast which is probably one of the most beautiful scenic viewpoints in Oregon. But my criticism of H.R. 4932 is that because our beach access and park program is substantially completed, we would not qualify for any federal

funds under this bill. As I stated, most of the state's acquisitions were done at state expense. It seems to me unfair to penalize Oregon because it is ahead of many other states in preserving this very valuable and precious national asset.

RECOMMENDATIONS

It is not my purpose to merely be critical of H.R. 4932 or to propose that the bill be defeated. Rather I feel that the underlying purpose of H.R. 4932 is desirable. My objection is to the means rather than to the end. The beach lands of the United States are one of the nation's most precious scenic and recreational resources. In some states, it is essential that measures be taken such as we have taken in Oregon to preserve those assets. In other states measures are needed to restore the beaches to make them better recreational and scenic assets. I would strongly support H.R. 4932 if it basically embodied the concept of a National Seashore Policy. This is not just a matter of local or state interest, but involves the entire nation. Citizens of our inland states have an almost equal interest in protecting our seashores as do the coastal states. However, the implementation of a National Seashore Policy necessarily requires a partnership between the state and federal government. The actual implementation of any such policy necessarily is going to have to be left to the individual states because of the wide variation in the historical development and ownership patterns between the states. As I mentioned, Oregon has had a strong tradition of public ownership, which is in contrast to the tradition of private ownership that exists along most of the Eastern seaboard. The common law of real property varies from state to state. Even the adjoining states of Oregon and Washington have applied diametrically different property law principles. In Oregon, the problem is no longer one of asserting public ownership of the beaches, but rather is one of protecting the uplands. Unquestionably steps will have to be taken in other states to acquire private property rights to the beaches themselves. It would be my recommendation that rather than Congress expending funds for the narrow purposes set forth in Section 210 of H.R. 4932, that such funds be made available to the states on a much broader basis for general seashore development and planning. It appears that you already have available to you the machinery for accomplishing this objective by virtue of the provisions of the Land and Water Conservation Fund. The objectives of a National Seashores Policy could be achieved by dedicating the amount of monies contemplated by H.R. 4932 to this fund, subject to the provision that they shall be used for general seashore development. By use of such a fund, the states would be in a position to develop comprehensive seashore plans which meet the individual priorities and needs of each state.

Mr. JOHNSON. All right, fine.

In my oral statement I would like to reverse the order of things, because I feel that my written statement may have been more negative than intended, because I do support the underlying purpose, those as I interpret them, of this bill.

It seems to me that the beach lands of the United States are one of our most precious assets, both from the scenic and recreational standpoint, and I think if the purpose of this bill is to really to try to develop a national seashore policy, to preserve, to protect and, in many cases restore the beaches, the nation's beaches, to make them better recreational and scenic assets, I am very much in support of that idea, because it seems to me that the beaches are not just a matter of concern to States like Oregon that are coastal States, but our inland neighbors come to Oregon, and I am sure they come to Texas and coastal States on the Eastern Seashore to enjoy those beaches.

I think the implementation of a national seashore policy necessarily is going to require a partnership between Federal and State governments.

I think that such a policy can be implemented, indeed, I think there is the present machinery to do that, and particularly, I refer to the provisions relating to the Federal Land and Conservation Fund, which is Public Law 88-378, which was enacted in 1964, which made funds available for planning and for acquisition and for general development of beaches as a recreational and scenic asset.

It would be my suggestion that the real thrust of the Congressional action should be directed towards that Fund, or a comparable fund, earmarking a substantial appropriation for that purpose to assist the States.

I do have some reservation about the specific provisions of H.R. 4932, and I believe the bill should be substantially amended along the lines that I have already suggested.

As I read the bill, it is drafted along the lines of the statutes that have been passed in States like Oregon and Texas. It seems to me the principal provisions of Section 204, which empowers the Attorney General to initiate litigation to establish public easements, and to exercise the power of condemnation where it would be necessary, and in Oregon that same authority is vested in our State Highway Commission, and my office acts, of course, as counsel for the State Highway Commission, and that is why we were involved in litigation that has reached considerable national prominence in our State.

I note that you state in the Act, particularly in Section 202, that it is the declared intention of Congress to exercise the full reach of its Constitutional power over the subject, for example, the beaches throughout the United States.

Frankly, it is my opinion that Section 204 is a very doubtful Constitutionality, because Congress would be interjecting itself into an area of jurisdiction which I think is probably reserved to the States under the 9th and 10th Amendments of the Constitution.

It should be emphasized, I believe, the type of easement that we are talking about—the type of easement that has been established in Oregon and in Texas and a few other States, are common law public easements.

Now, such easements, as I understand the law of property, do not belong to any agency of Government, but rather do belong to the public at large, and the general doctrine of law is that such easement can be asserted by any member of the public who is affected thereby, or by any governmental entity that has sovereignty over the land in question.

And it would seem to me that really only the States or their subdivisions have sufficient sovereignty to assert such public right. The government has no sovereignty over these lands, at least that I can see, and they are certainly not part of the public domain or the Federal domain.

Indeed, it is clear under the Act for most of the States like Oregon, that came into the Union, that the lands that are the submersible lands, belong to the State, and are title ownership in the State.

Of course, I recognize that Congress does have power through its Interstate Commerce—through the Interstate Commerce clause, but it seems to me that the relationship here it at best continuous, and I

really very much doubt as a matter of law whether it creates a sufficient connection to say that the Federal Government has a sovereignty to establish to be the public agency to assert these rights.

I think, also, there is a very definite problem of real property law, because I think it is well established that real property ownership, and likewise, easements—any easements supersede the title ownership must be determined under State common and statutory law, rather than the Federal law.

Now, in Oregon we were able to establish that the public had acquired a recreational easement to the beaches, not only talking about the submersible lands, but I am talking about all that portion of the beach which we referred to as the white sand area, which is really east of the mean high tide, and the uplands.

We were able to establish an easement.

Mr. ECKHARDT. East of that, in Oregon?

Mr. JOHNSON. Yes, right.

Mr. ECKHARDT. Dry sand beaches?

Mr. JOHNSON. Right, but with the *Hay* decision, *State ex rel Thornton versus Hay*, established, I think, very clearly the State or the public had acquired easement to that entire area.

We do have litigation now as to whether it extends beyond that area which has been initiated by my office, and in that case, of course, the court premised its ruling on the English doctrine of common law and the English doctrine of custom.

The court did indicate in that case, that likewise as to specific parcels we could probably establish public easement, either through the doctrine of prescription or implied dedication, but other state courts have indicated a contrary view.

Indeed, our neighboring State, the State of Washington, has held that the public cannot acquire an easement by way of prescription.

So I think you are left with the problem that even if section 204 was constitutional, the Federal courts would be placed in a position of trying to guess what State law is, or what the high courts in the States are going to hold.

Now, this is not a totally extraordinary situation. Of course, the Federal Courts do this in what we call diversity of citizenship action, but I think the practical problems there would be much greater than in that area, because most States do not have any high court decision in this area of the law, and as the consequences the Federal court should really be guessing what a high court in a State might hold, or might not hold, and I think such a situation is very untenable, because real property law is one of those areas of the law where I think it is universally recognized that certainty is a very important principle.

I think also that the presumptions that are contained in section 205 raise some very serious Constitutional questions.

We did not have such a presumption in the Oregon act, because of the constitutional questions raised, but I think there are really two constitutional questions.

Now, as I understand it, and as I read the act, and in listening to you Congressmen, is that this is a rebuttable presumption, but it

does, and it could be said, "well, it is merely procedural in nature, not substantive," but I think it really is affecting the substantive rights of the landowner, and that I do not think Congress has the authority to change a State common law relating to real property in this manner.

And secondly, I think by placing that presumption, you do have in effect an unconstitutional taking of property in derrogation of the fifth amendment.

Now, I recognize that Texas does have a statute that creates this presumption, and that in the *Seaway* case that presumption was upheld, but it is my——

Mr. ECKHARDT. Let me interrupt you at this point. That is not precisely correct.

The *Seaway* case, since it did not reach the presumption, expressly stated that we are not making a determination on the constitutionality, or unconstitutionality of the presumption. We are only relying on the act to give the Attorney General authority to move in this area, and whether or not the presumption is constitutional, the bill would be severable of it.

Mr. JOHNSON. I agree with you, and I think in effect you really have no court decision saying you—saying that such a presumption is valid, and it is my view it really would not be valid, because it seems to me—I mean, the general rule of law is that title ownership —you have title ownership, and you take the doctrine of prescription, dedication, adverse possession, the doctrine of custom that has been applied in Oregon, and those are exceptions to the rule, and the burden of proof has got to be on the person that is asserting the exception because you place a landowner in a very untenable position.

How does he prove that his property has not been occupied by adverse possession, and for that reason I would have a serious concern as to whether it would not amount to an unconstitutional taking.

Speaking for the State of Oregon, we are also concerned about the possibility of overlap and duplication of jurisdiction that would result if both H.R. 4932 passes in its present form.

As I stated, we have already established public easements to the beach lands throughout the State.

Furthermore, the State has launched an extensive program to provide access, and to accomplish all the other objectives that I see that are set forth in H.R. 4932.

We have an overlap jurisdiction, and certainly some friction between State and local government in this area.

We have to deal now with this, because there is a considerable amount of Federal ownership, both under the U.S. Foreign Service, and also now the National Park Service in the dune area on the southern coast.

If H.R 4932 passes we are going to interject two more Federal agencies, the Department of Justice and the Department of Transportation, and frankly, I think the addition of these two more Federal agencies into the picture will just create a jurisdictional morass.

Finally, maybe the most serious objection that I have to the provision of the bill, as it is presently written, are those provisions re-

lating to financial assistance to the State for acquiring beach lands and access thereto.

As I have stated, the concept of Federal financial assistance in this area, I think, is very desirable and probably is going to be necessary.

Certainly, looking at the situation in other parts of the Nation where I have lived on occasion and visited on occasion, but as written, the bill is discriminatory against States like Oregon, which have already accomplished most of those objectives.

The bill, as I read it, contemplates financial assistance to assist in acquiring public recreational easements to the beaches themselves, to construct the necessary highways and roads to give access to the shoreline, construction of parking lots and adjacent parking areas as related, as well to transportation facilities.

Well, of course, as I said, in Oregon we have already established the public easements.

In addition, in Oregon, in conjunction with our beach bill, we have gone through a very extensive program in this State. The State Highway Commission, for example, now operates some 76 State parks, constituting over 30,000 acres along the 362 miles of coast line in Oregon.

Indeed, you cannot drive down Highway 101, which is the Coastal Highway in Oregon, you cannot drive for a distance of more than 21 miles from any two points without coming to a State park.

In addition, the State Highway Commission launched in 1967 a beach access program of providing access at 3-mile intervals down the coast. This is the building of access roads and building of attendant parking facilities. And as those are completed, then the prohibition is put on any vehicles being allowed on the beach itself.

That program is 70 percent complete today, and it is expected it will be completed within the next 20 years.

The principal problems that we face in Oregon, as distinguished from other States, is not, in other words, on the beaches, but really involves the upland behind those beaches.

In recent years, we have seen a tremendous increase in the development of hotels, motels, condominiums, attendant facilities along the coast. And, frankly, much of this development has been uncontrolled.

In 1971, the Legislature, I think very wisely, established a Coastal Conservation and Development Commission, which is charged with the responsibility of developing an overall master plan for zoning the Oregon coast. And, hopefully, this will lead to more adequate planning.

But a comprehensive plan, as I am sure you recognize, does require funding. Likewise, the State is going to have to, I think, acquire by condemnation other upland areas if we are really going to protect the integrity of our coast.

Now, we have—and just recently, just this year—acquired a very major parcel, one of the most scenic points on the Oregon coast, with the assistance of Federal funds from the Federal Land and Water Conservation Fund.

I think it is essential that the funds be made available under 4932 on a general basis to States, so that the States are in a position to

develop comprehensive seashore plans which meet their own individual priorities and needs.

I think Congress has to recognize that the alternative sovereignty for protecting these lands still lies with the States, and unless there is a constitutional change, I do not see how we can get away with it.

I think we have got to have a partnership in the ultimate implementation of a national seashore policy, which is going to have to necessarily rest with the State. And the States do have a tremendous variation in their historical development, in their common laws. And with those kinds of variations, I do not see how you can apply the kind of principle in H.R. 4932 that are presently written there.

In conclusion, I certainly urge Congress to try to adopt a national seashore policy which will provide financial assistance to the States, but I think the means that are selected in H.R. 4932 will not accomplish that objective.

I would be glad to answer any questions.

Mr. ECKHARDT. Mr. Kyros?

Mr. KYROS. As I understand it then, from your very fine statement, Mr. Johnson, you do not think there is any need really of a Federal law with all of the provisions that you heard about earlier this morning, but rather the development of a comprehensive State law; is that right?

Mr. JOHNSON. I think the real point, I suppose—and I do not think the Federal Government really has the power to step into this area of claiming these common law easements, because these common law easements have to be determined under State law.

Mr. KYROS. What about some uniformity throughout the United States if, indeed, there is a Federal interest in public beaches that can be impressed upon them?

Should there be a Federal uniformity as to how beaches will be dealt with?

Mr. JOHNSON. Well, again, I suppose my answer to it is that that might be desirable, but I very seriously doubt Congress has that power as a matter of—simply as a matter of constitutional law.

I think also I am not so sure it would be desirable.

The situation in Oregon is certainly much different than what I know of Cape Cod, for example, because I spent some time in my early years on Cape Cod.

The court was faced in the Oregon case with a situation which is probably unique, I think, to any State.

There was a common law belief amongst all Oregonians that existed for many years that our beaches were in public ownership, indeed.

Mr. ECKHARDT. I do not think that is an unusual viewpoint.

It is precisely the same that exists in all people in Galveston.

Mr. JOHNSON. Okay.

That is probably true, but I know in Cape Cod, in other areas along Long Island, I have seen where beaches are fenced off, this type of thing, that had never occurred in Oregon.

Part of it grew out of, in 1913, Governor Oswald West, who was a man of considerable foresight, made a declaration and got through the Oregon legislature that beach lands were a State highway.

What he was referring to, of course, was submersible lands, but the fact was that most Oregonians, including the landowners on the coast, all believed that the effect of that action was to make Oregon's beaches public in perpetuity. And it was not until the 1960's that somebody woke up and realized that, really, the only public right that had been established to that date was up to mean high tide, and here was this vast sand area that was still in question.

Mr. KYROS. Well, you pointed out very succinctly, I think, and in a very competent manner, problems that existed in Oregon, but those problems, it seems to me, are multiplied by many coastal States, each having a separate history, you know, in the development of their own common law as to the use of the beaches.

Would it be proper for the Federal Government to come in and without taking over still to establish standards and policies that could be followed to assist the States in carrying out the interests of the people in using the beaches?

Mr. JOHNSON. I see nothing inappropriate from the standpoint of —and I think the appropriate way, which the Federal Government has often done, is through the power of its purse, in saying, "We will assist you, subject to these conditions, that you develop comprehensive zoning plans," this type of thing.

I think that is very appropriate.

Now, I certainly—if I was in the shoes of Congress, I would say I am not going to spend our money unless we have some assurance that the State is going to do the job, but the job that has to be done in Maryland or Cape Cod is a far different job than has to be done in Texas or Oregon or California.

Mr. KYROS. Thank you very much.

Mr. ROGERS. Gentlemen, we appreciate your appearance here today and the ideas you have advanced.

Would you think we should do it in a categorical manner or should we do it through a revenue sharing approach, if we give funds?

Mr. JOHNSON. I have no objection—I happen to be a supporter of Federal revenue sharing and the general concept behind it. But I think also there are areas of national concern that I would hope it would be drawn in terms that are sufficiently general, and that, I suppose, is my biggest concern with the Federal bureaucracy oftentimes is that they not keep—that they sometimes get too specific to the point that we end up developing priorities that are not very realistic—that may be realistic for California, but not for Oregon.

But I happen to think the seashores are a national asset.

My friends, and indeed in Ohio, for example, and I am from the Midwest, they feel as strongly about those beaches as I think most Oregonians do.

Mr. ROGERS. You have no objection to a categorical approach as long as it is not going to be confining?

Mr. JOHNSON. No, I would not.

Mr. ROGERS. Thank you very much, Mr. Chairman.

Thank you.

Mr. ECKHARDT. Mr. Attorney General, actually I fail to see how you understand this bill as discriminatory against Oregon.

I think 209 does encourage what Oregon has already done, and, I think, what Texas has done. It is very difficult for me to envision another State that might not have to do more, but the two States that would not have to do more would be Texas and Oregon.

The bill says that the Secretary can authorize grants up to 75 percent Federal where a State has complied with this title, and where adequate State laws are established in the judgment of the Secretary to protect the public's rights to beaches.

Now, Oregon has passed a law that flatly says that these lands referred to here are available to public right in response to the *Hay* case that you described.

So it would be difficult for me to see how Oregon could not possibly be in compliance.

Then, in section 210, the bill addresses it exactly—the area now needs aiding, and that is the area behind the dunes, and it expressly talks about parking areas, access roads, aid in this kind of area.

It would seem to me that section 210 includes a standard which Oregon has already met, and which would actually give Oregon almost the first shot at the 75–25 grant.

Mr. JOHNSON. Well, and I am sorry, but somewhere in my brief case—I could not find my copy of the bill, but as I read it, the bill—there is a clause in there that would prohibit or would not prohibit —pardon me—would allow broader funding to do the kind of funding that we are now doing because the specific things that are mentioned in here will have been completed by the time this act would become law.

And what I really am worrying about is not what Congress spends, but the way this bill is drafted is that I am afraid that the bureaucracy is going to say, "No, we will only give you money for access roads, for parking, and for building a coastal highway." And these are the things we have already accomplished.

Mr. ECKHARDT. Section 210 says,

> The Secretary of Transportation is authorized to provide financial assistance to any State, and to its political subdivisions for the development and maintenance of transportation facilities necessary in connection with the use of public beaches in such State, if, in the judgment of the Secretary, such State has defined and sufficiently protected public beaches within its boundaries by State law.

Which, of course, Oregon clearly has.

> Such financial assistance shall be for projects which shall include, but not be limited to, construction of necessary highways and road to give access to the shoreline area, the construction of parking lots and adjacent park areas, as well as related transportation facilities.

Now, that is pretty broad.

Mr. JOHNSON. My point is this, Congressman, and I am not—I do not think we are really in disagreement, but my point is the specific things here, construction of necessary highways and road to give access to the shoreline, the construction of parking lots and adjacent parking areas, as well as related transportation facilities, we have accomplished those objectives in the State of Oregon.

Now, there is a clause here, "but not limited to," which would, I think, open up funding for some of the types of things that we are

now trying to do in the State of Oregon, but my problem is that not what Congress intends, but when it gets in the hands of some of the Federal bureaucracy, they say unless it is for one of the specific things, you cannot have funding for it.

Mr. ECKHARDT. I would invite you to suggest some language.

Mr. JOHNSON. I have gone through this bill many times.

Mr. ECKHARDT. Well, I would invite your supplying language, if you would do so.

Mr. JOHNSON. I would be delighted.

Mr. ECKHARDT. Of some of the additional needs, because it has been my experience that States almost never have sufficient funds to properly develop, at least, in an ideal fashion the availability of their recreational land.

I know Oregon has done a splendid job. As a matter of fact, as I said in the beginning, both in the lower court and in the process of your administration of your beaches, I think that Oregon is exemplary in its program. I know of no State that has come close to your development in these areas.

But it seems to me it would be very difficult to have all your problems solved, and you can just stay there from now on.

I do not think you have ever arrived at that position in the State, do you?

Mr. JOHNSON. Well, knowing we have not arrived, there are real concerns, more with those uplands than it is with the beaches.

And to this extent, let me say this, we are concerned—my own personal concern in Oregon is that we have done a great job of protecting our beautiful beaches along the coast, and we are liable to end up with a bunch of junk, a cardboard jungle that blocks your view to get there, and that is what we are trying—what I am getting at.

I would be delighted, Congressman, to submit an alternative language which I think would accomplish the concerns that I have.

Mr. ECKHARDT. I would think that you probably would be concerned with dune protection in this, would you not, and enough room behind the dunes to actually protect them?

Mr. JOHNSON. Right.

Mr. ECKHARDT. Incidentally, on that same point, you referred to a case, I think, in Washington State, in which it had been held that there was no prescriptive right.

And were you referring to *Gordon* v. *Hill*, and *Gordon* v. *Burry*?

Mr. JOHNSON. No.

I think the case that—it is cited in the former testimony that I submitted there, and it is *Shorett* v. *Blue Ridge Club*, and there is one other case which I should have included in there, was the *Hughes* case in Washington. And I would be glad to send you that citation.

Mr. ECKHARDT. I am familiar with that *Hughes* case. That was the case in which Washington had originally held that as a matter of law, it was entitled to the beaches back to the dunes and even went further than that.

It was where the dunes were in earlier times, which was broader than the existing dune area at the time. I believe, and certain other questions, I believe, were raised in that case.

The Supreme Court reversed the Supreme Court of Washington on the point, I believe, of the use of previous location of dunes. I do not think the Supreme Court ever addressed the broad question of whether or not the area back to existing dunes constituted public land or otherwise.

Mr. JOHNSON. I have to be very honest. I have not read some of the cases since I argued the *Hay* case a few years ago, but the *Blue Ridge* case, at that time we felt, you know, it was just clearly authority to the opposite direction, and there are other State jurisdictions.

For example, who says the public cannot acquire easement at any time?

Mr. ECKHARDT. However, I have discussed this matter with persons in the Attorney General's office in Washington that has had control of these cases.

He tells me that the State of Washington is, in fact, taking exactly the same position that Oregon takes with respect to it entitlement to land back to the dunes, and that these matters have not been put in contest.

Now, the two cases I referred to, the *Gordon* v. *Hill* and *Gordon* v. *Burry*, of course, were cases in that area, which you say is now sensitive to the State of Oregon, too, and that is behind the dunes.

There was the question of access to the area that we are discussing in this bill. And in those cases—these cases were brought by the State attorney general of the superior court for Pacific County to enjoin bulldozing, primarily, dunes on the Pacific Ocean front.

A temporary injunction was issued on January 25, 1971, and in *Burry* on November 5, 1971.

There the bulldozing was landward of the vegetation line.

The State, nevertheless, took the position, and injunction was necessary because the structures of the preliminary dunes threatened the people's right to use of the beach.

The preliminary injunction, as I understand, is still in the State of Washington and is still contending that it not only has a right to protect the area we are discussing in this bill, but also that the dunes themselves.

So in Washington, if the law has gone against it, it is nevertheless enforcing a stricter law in favor of the public as I think Oregon is, as I understand it.

Mr. JOHNSON. I think it is trying to.

I think there is a tendency in the law in this direction, but I think there may be even some inconsistency.

Now, one point I did point out in my written testimony, which I did not mention this morning, this bill that just passed this last legislature, and I supported it although it was not a bill introduced at my request, and was supported by environmental groups, generally, was a bill that says as to any future public use over a private land, that this will not create any new rights in the public. It does not affect any preexisting right that exists.

The reason for this was because of the concern that resulted from the *Hay* case.

We, of course, not only our beachland, we have a lot of timberland, private timberland and so forth, where, you know, the public

does use it a lot, and all of these people were becoming very concerned, "Are we losing our property rights," because we have basically said, "Fine, go ahead on your property." And they started fencing it off and posting it, and this type of thing. And that was the reason the legislature decided to pass that bill, was to cut off that concern.

Mr. ECKHARDT. Mr. Attorney General, I cannot help but contrast the view that you take at this time from that that the Governor took with me prior to the time you won the *Hay* case.

As a matter of fact, he discussed the matter with me in my office, in treating the legislation at the Federal level, as I recall, the State of Oregon, shortly after that, adopted almost the identical language of the Texas bill.

You had your remarkable success in the *Hay* case, for which I must congratulate you.

Mr. JOHNSON. The Oregon bill was considerably different from the Texas bill.

I and one of the legislators, in effect, drew that bill, because it got into a very heated controversy. I have never seen such a public reaction, except possible recent events here in Washington, that we had in the State over that bill, but one of the things that we were concerned about, and most of the lawyers in the legislature at that time were concerned about, and an awful lot of the bar, was whether we would really be successful in proving those easements. And I was skeptical as to whether we would win the *Hay* case on that point.

And as it ended up, we really did not need the beach bill, because all we were doing was asserting a common law easement, and the courts said we had it.

Mr. ECKHARDT. Then you do not need this act because you have already got it. That is the point.

Mr. JOHNSON. Well, the interesting thing—the interesting provision of that bill, the main provision of it was a fallback position because we came up with the idea where we said if we cannot prove an easement, we are going to exercise the State police power and zone it. And we are going to exercise that power to its fullest extent.

And the *Hay* case never had to reach that issue.

Mr. ECKHARDT. You know what the difficulty with that approach is.

Do you find it constitutionally difficult with the prima facie holding?

How can a State, for instance, zone away individual's rights if it cannot, for instance, put into effect the procedure by which a prima facie presumption exists?

Mr. JOHNSON. The zoning provisions that we had said no one could construct anything on the beachlands themselves, without a permit, and we never got to that question.

There was no question we were going to try to drive that police power as far as we could go. We did not know how far we could go.

We felt we could certainly prevent the hotdog stands, the kind of junk that you would get. And one thing about beach land, pure beach land, they really are not suitable for any kind of construction.

Mr. ECKHARDT. That is right.

Well, thank you, Mr. Attorney General. Thank you very much.

Governor McCall and I are very, very close, and he and I do not always agree on every subject. And I think Mr. Potter has a few questions.

Mr. POTTER. Mr. Johnson, are you familiar with the Coastal Zone Management Act passed by Congress last year?

Mr. JOHNSON. I am not as familiar—I really am only aware of that act as passed, and one of those things that I have to get down and study.

Mr. POTTER. I am not trying to trap you, and I realize that that is kind of a dangerous question for one lawyer to ask another, since I would follow it by my next question: "Are you aware that in such and such a section that all of your objections disappear." Earlier witnesses have suggested, and subsequently will suggest, that the Coastal Zone Management Act accomplishes everything that we are trying to do in this bill.

And I guess what I would ask you to do, if you have the chance, is to consider the problem that we have addressed in this legislation against the text of that bill, and at a later time——

Mr. JOHNSON. I would be glad and delighted to do so.

Mr. POTTER. Let us know what you think.

Mr. JOHNSON. I will very defintely do that.

I do not happen to be one of those who—I am very concerned about Federal intervention to some extent, I suppose, and I am like everybody else, but I am not as concerned as some of my fellow State officials.

I think a little bit of pressure from Congress in the area of land use, zoning generally, because I happen to think this is the critical environmental issue that faces—certainly faces my State.

We have turned the corner in my State in air and water pollution.

The real question is land use planning, and the kind of help, if we can pass the buck once in awhile up the line, just as the local likes to pass it up to us at the State, because I think there is no more volatile issue in this matter than land use planning.

Mr. POTTER. Would your apprehensions about constitutionality of the section dealing with presumption of the right of public access be lessened if it were to be made clear that that presumption would extend only to the point that it could be rebutted by evidence to the contrary? In other words, if it were a burden of going forward rather than a strict burden of proof?

Mr. JOHNSON. I really feel, particularly with prescription and adverse possession, prescription being as to easement, adverse as to being title. I think you place the landowner in a very untenable position when he has to prove—like having to prove you were not negligent. How does he prove that his property was not subject to adverse use.

Now, as to implied dedication which actually is, as I recall, and I have to admit I have not read that case as recently as I should have, really is the seaweed case went to an implied dedication more than it did on prescription.

Mr. ECKHARDT. That is correct.

Mr. JOHNSON. There I am not quite as concerned about that presumption.

Let me say I raised this point. It is not a relevant point as far as we are concerned in Oregon. We have established those easements but I do think it is a point that I am familiar with as a lawyer because I have been dealing in this field, and I think it is something you have got to contend with. It may not be unconstitutional.

Mr. ECKHARDT. Let me suggest to you a case allied with this——

Mr. JOHNSON. A court has to decide that, ultimately.

Mr. ECKHARDT. If you will permit me, we had that question. The question could come up like this. The Matagorda Peninsula—peninsulas historically have been unavailable to the public, is cut across by the Texas Colorado River, and that particular area is so marshy people have not been able to get on the peninsula. The peninsula has been used as long as anybody can remember for grazing cattle. The seashore area, the gulf area has in effect at the east a fence, the sea is to the east in our area, of course, and the proof of that fact would almost certainly rebut a presumption of prescriptive right in that case. It would not necessarily rebut a presumption in favor of the grant not including the right of the owner to exclude the public but as far as prescriptive right is concerned in a case of that nature, that is the kind of rebutting evidence that would certainly be available and would I think with respect to prescriptive right preclude a contention that there was a prescriptive right to the use of the Matagorda beach. So, it is really so impossible to bring out such evidence. It might be very difficult to bring out such evidence on the West Galveston Island.

Mr. JOHNSON. I think it would depend on the individual case, but I can think of some cases—I buy a piece of property and we have a case right now and the landowner keeps telling us what he has done—he has only owned the property for 5 years and we are saying that the prescriptive was picked 20, 30, 40, 50 years ago. How does he put on the evidence as to that period? That is where it gets tough on the landowner.

Mr. ECKHARDT. That is correct but how does the State put on the evidence and why should the case be weighed against the State?

Mr. JOHNSON. Well, I think it is basically this, that as I understand part of this is going back to schooling in real property law, but in real property law we always have—I think you always have to take this basic premise that certainty of the law is a very important element, that people have got to know that these are the boundaries of my property, both the adjoining and both the adjoining landowners and everyone else has to know where those boundaries are, what are the limits of those properties and the doctrine of prescription and adverse possession, and so forth creep into the law because of the recognition that you did have to have some exceptions to title ownership because to accommodate the typical situation, and I remember when I had my own house which is an old house in the city of Portland where some 30 years ago the landowner built the hedge over on my neighbor's property, and the fact of the matter is that we have occupied his property by adverse possession, and that is both of us recognize that was where the title is but there

are exceptions to basic principles which I think is probably very central to the whole concept of real property law and that is why I think when you shift that burden of proof, then you are saying really that slip of paper that says—that has a metes and bounds description of your property is meaningless.

Mr. ECKHARDT. I do not think so. I am surprised to hear this coming from a man in a State where the customary right to the beach has been established as a matter of positive law.

All in the world this does is say is this a presumption in favor of that customary right and how you can say that this is a shocking intrusion on private property just surprises me, frankly.

Mr. JOHNSON. We had no problem proving it. Of course, we were not proving it—we were proving adverse use. We were trying to prove adverse use but we certainly had no problem proving public use law beyond the statutory limitation period, and I think the court in adopting the English doctrine of custom, it was a somewhat unprecedented situation from this standpoint that there is not much law or authority other than Blackstone and a 1932 case in New Hampshire, but I think the court did reach a very wise conclusion, but I think they said that custom really is not the statutory limitation period. It has to be a much longer period than that, and they pointed out the fact which we had no problem establishing that the Oregon beaches have been used for this purpose for well over 50 years, well over—well before we had come into the Union.

Mr. POTTER. My recollection is that there are seven coastal counties in Oregon along the Pacific Ocean.

Mr. JOHNSON. I think that is approximately right. I cannot count them all.

Mr. POTTER. I just counted them on my fingers a few minutes ago.

Are you running into any problems with the county governments with regard to the kind of controls that you are imposing or trying to impose?

Mr. JOHNSON. Very definitely.

Mr. POTTER. Are those the kind of problems that we might be able to help you with in the context of Federal legislation?

Mr. JOHNSON. No. I do not really think so. I think there is a difference of public opinion along the Oregon coast. I was raised on the Oregon coast. I was raised in Lincoln County, but the real estate interests along the coast tended to take pretty parochial viewpoints and oftentimes they occupied the city council or had predominant voices in the city council and the county commission; but when it really comes down to public opinion, and we have a very controversial case going now in which we are trying to—we are asserting this doctrine of custom and prescription beyond the vegetation line.

Mr. POTTER. That is the *Bauman* case?

Mr. JOHNSON. Right. And my mail increased substantially when we filed that case but it was really quite interesting the mail I got from the coast. It was about 50–50 and I, of course, I think everyone knows that mail is not a very good indication but there were an awful lot of people down the coast who said "great." So, there is a difference of opinion even there but the population centers of the State who, you know, solid support, there is of course those who

will try to protect the coastline, the local business interests and I think they take a very shortsighted viewpoint and we have, frankly, some of the development we have seen on the coast now is much better development than we have ever had on the coast in the past.

Of course, when I grew up the Oregon coast—a family would come from the South and from California and then to Oregon. The general attitude was then Oregon was never going to be developed anyway. Who wants to come up there and sit in all that rain. Now we get something like 10 million Californians every summer. But those are changes. Those are changes.

Mr. POTTER. What are the kind of controls that you are trying to impose in the upland areas? I guess we all know Governor McCall has turned out the neon lights. Are you trying in effect to get them to take them out altogether? Is that the kind of control you are talking about?

Mr. JOHNSON. Of course.

Now, I cannot state with authority. I know pretty much just this last year completed the Highway Beautification Act, and I think we are one of the few States that has—we are in process. We have bought those billboards and in fact right now we are going to leave a few of them up and we have gotten industry cooperation where we are going to use this Scotch light and say that our lights are out but the service is still on to try to help out the motel and restaurant owners who are concerned over the problem that they cannot turn on their signs. This is a temporary problem. We have got to much more a severe temporary energy crisis in the Nation—in the Northwest right now because of water.

Mr. POTTER. I asked my question a little obliquely. Are the kind of controls that you are trying to impose "transportation oriented" since that would allow the kind of help that the Chairman was talking about with respect to the section 210 of the act or land use controls?

Mr. JOHNSON. Land use controls. We are trying to develop a master plan for the Oregon coast which will, you know, provide for ordinary private development and ordinarily public development. We are a lot better off than most places are because 50 percent of uplands are in public ownership today. The State is the predominant owner by the Forest Service, which also owns a good part of that upland. We have an area in Oregon called the 20 Miracle Miles which is up in the northern part of my old county which then Governor Hatfield referred to as the 20 Miserable Miles.

Mr. POTTER. With some justification, as I recall.

Mr. JOHNSON. Yes. It is a tacky bunch of developments. It is improving but that is the kind of thing we have got to prevent but I do not think there is any movement in Oregon that will make our beaches into a permanent release area. We recognize people are going to come there. We are going to have facilities and there will be room for private enterprise and commercial development. It has got to be ordinary development and it has got to be development that fits into the general economic environmental program for the whole coast.

Mr. POTTER. That is all the questions I have.

Mr. ECKHARDT. Thank you, Mr. Johnson.

The committee will, at this time, recognize Hon. A. R. Schwartz, State Senator from the State of Texas. It is a pleasure to have you here today.

I know you have been one of the most instrumental forces in Texas in establishing good land use planning and supporting beach legislation study. I know you will be most helpful to this Committee.

STATEMENT OF HON. A. R. SCHWARTZ, A STATE SENATOR FROM THE STATE OF TEXAS

Mr. SCHWARTZ. Thank you, Congressman.

I think the record ought to reflect that you and I served together in the Texas legislature and one other thing about which I am proud and I think the Nation ought to be more familiar with is the fact that 14 years ago, through your efforts, Texas became the first State in the Nation to protect the right of its people to gain access to their beaches which they have used since that time immemorial.

I am not going to read all of the remarks that will become a part of the testimony here today.

Mr. ECKHARDT. Without objection, you may proceed to summarize and speak extemporaneously and your remarks will be put in the record.

Mr. SCHWARTZ. I have taken the liberty in addition to the remarks to furnish not for the record, but for the Chairman and for the members of the committee copies of the publication of our Texas beach committee of which I was chairman called "Footprints in the Sands of Time," which contains the Texas story of our fight for the public's rights as well as a summary of the law of Texas to date.

Mr. ECKHARDT. That will go in the files of the Committee.

[The document was received for the committee files.]

Mr. SCHWARTZ. Thank you.

In addition to that, I submit a summary of the state of the law and the state of the art, so to speak, of the public rights to the beaches and State protection of that right in a narrative form divided in various ways including areas other than the concern of the public beaches themselves but rather the whole coastal zone.

I am delighted that I got to hear the other testimony this morning because in departing from my remarks I want to preface the remarks that I am about to read by saying there seems to be a negative attitude of sorts in terms of establishing the presumption nationally that also exists on our State level.

The facts of life are that before the Texas Open Beaches Act which you so ably sponsored was passed the same negative attitude prevailed in our State as is now indicated across the Nation.

Although the attorney general of Oregon says that in Oregon people just presume that they have a right to the beach, and that attitude may not exist on Cape Cod, it occurs to me that people everywhere, as you indicate, believe that they have a right to the beaches and presume that they have a right to be there except in

those States where they obviously had been sold out in prior years by a State government who gave or sold those public rights to landowners. This is precisely what we are trying to avoid for the future.

I am distressed that more has not been done nationally. Since 1969, when you introduced this bill, a great event occurred in the passage of the National Coastal Zone Management Act which could provide a basis for your legislation being implemented on a State level. I think all you want to accomplish could be accomplished and the money made available through that 1972 act. It would work well in Texas because our general land office is designated as the agency for concerns of coastal zone management in Texas by virtue of an act which I authored and passed last session, and there is some money in the budget in this Congress, as I understand it, to fund coastal zone management. I am certain that Mr. Knecht, who was here earlier, will address himself later this afternoon to that act and its possible use in your goals.

I think your passage of the Texas act brought about a great change in the Texas attitudes about beaches and the most important part of that act is that it has provided a foundation for developing State policies to make public beach rights meaningful. The coastal zone committee, which I chaired for 6 years, recently heard testimony that public rights were worth little if the beaches were filthy or cluttered with commercial establishments. During the past several years, therefore, I have authored and passed law providing State funds to local governments for beach cleaning, for regulation and limitation of commercial activities on public beaches, for prohibition against signs attempting to exclude the public from public beaches and restriction on sand removal from public beaches and barrier islands as well as the sand dune protection act.

Again, I would add here to my comments that Corpus Christi adopted, last week, this first dune protection ordinance under the dune protection act which was passed in the last session to protect the sand dunes and require permits before any alteration might occur on the center line of the sand dunes in that county.

I expect every coastal county in Texas to adopt that sand dune protection ordinance under the bill we passed in the last session. We are going a step further than the title to the wet beach and then to the easement to the dry beach by also regulating activities on the dunes.

I also firmly believe, that the legislature was familiar with the beach legislation and that familiarity was instrumental in the passage of a Coastal Land Management Act in 1973. I believe the 1973 Texas act will put us in compliance with Federal Coastal Zoning Management Act of 1972.

I allude in my remarks to my high school experiment which I think is the genius of what you did in Texas. They taught us to dip a bare string in a solution of sugar and water—just place it in a sugar water solution, I guess you might call it, and leave it overnight and in the morning the crystallization of the sugar would occur on the string. Over a longer period of time you would have a substantial amount of crystallization occur. I think what the legis-

lation did in 1958 and 1959 was simply dip that string in the water of the gulf and we have crystallized around that the public rights to the beaches in Texas and I firmly believe that a national act of the scope that you propose would do the same thing and great benefits would accrue.

I will stick to the statistical information and jump again to your act in the sense that I believe the proposed national open beaches law accomplishes what the State court cannot, the recognition of the national interest in beaches and in the right of the public to use them, and in so doing, places the prestige and weight of the Federal Government behind the open beaches principle.

There is every reason to believe that the experience of Texas would be repeated on a national level. Without H.R. 10394, the public can only hope to win its right to use the beach in lawsuit after lawsuit, beach by beach, having to prove its right with regard to particular facts time after time.

With H.R. 10394, however, once the principle of open beaches is established, the congressional mandate will be accepted and the States and the Federal Government can begin to implement a policy to enhance the public enjoyment of the Nation's beaches.

The landowners and shoreline developers of this country will find, as did their counterparts in Texas, that the open beaches concept has benefits for them as well as the public.

The primary benefit is certainty, for without any clue as to the existence or extent of public rights, a landowner who develops beach property in a manner which excludes the public now risks losing his investment in future litigation.

As I have indicated, the foremost feature of a National Open Beaches Act would be the elimination of the tract-by-tract litigation which currently is the only method available to establish public rights to the Nation's shoreline. But a National Open Beaches Act would have important secondary effects, just as the Texas act has done.

It will make the public aware of its rights. They will be able to insist that their local and State governments protect the rights they have earned through long continued use of the beaches.

Public awareness that the beach is free and open to everyone will also help eliminate one of the most shameful abuses of the American consumer—the developer who sells beach property which the unsuspecting purchaser later finds is impressed with a public easement. Once buyers realize that the entire beach is subject to public rights, this unscrupulous practice will be stopped.

A National Open Beaches Act will provide the needed impetus to encourage further Federal and State legislation promoting public enjoyment of the beach. Beach recreation, as H.R. 10394 states, is a matter of national interest, and public use of the beach should be encouraged through a Federal-State partnership along the lines suggested in the act.

Some of the areas where cooperation is necessary and which we in Texas are ready to undertake are acquisition of access roads and ways, development of local or pocket parks, shoreline and new

stabilization programs and land use controls to encourage the complementary development of littoral property.

I would also say that those who say that the State ought to assume that responsibility, that it is a State matter rather than a Federal matter, that it might well be the citizens of the State of Louisiana who helped Texas—who helped Texas citizens establish the prescriptive right of easement on our beach, it may well have been citizens of Idaho or New York or Cape Cod who came to Texas and used those beaches that helped us establish that easement. They may have been the people who drove down to the beaches. They may have parked on the beaches.

The beaches are a national concern and any citizen of these United States could help assist in the attainment of that prescriptive right by the use of that beach facility.

I would hope that funds are made available for matching fund programs because in reality whether Oregon believes they might be penalized under the provision of your act or not, I see a great opportunity for Oregon as well as anyone else to continue to acquire highly critical beach areas and related lands for public use.

Again, the staitstics show that 2 percent of the beachlands in this country are publicly owned and that comes from Mr. Gibbons' statement, the honorable Representative from Florida. In the case of Texas only 5 percent of the land is publicly owned and the easement applies to those areas from the vegetation line seaward if we can maintain that easement in the courts.

So, Mr. Chairman, anything that the Federal Government could do to establish a national policy which would make the public aware of its total right to the use of these beaches in our land and anything they can do to provide matching funds with which States might acquire more and more of this very fragile and critical area in our land I think would help preserve one of the last great public recreational areas that is still in existence but is threatened with extinction. I would respectfully urge this committee to do everything it can under whatever legislation exists, whether it be coastal zone management acts or any other independent method as presumed in the National Open Beaches Act itself that the National Government and the Congress get on with the business of helping the public reestablish its right to these public shores.

Mr. ECKHARDT. Senator, in connection with your testimony and also in connection with Attorney General Johnson's testimony, have you a copy of the bill before you? In section 210 of the bill, we state:

The Secretary of Transportation is authorized to provide financial assistance to any State, and to its political subdivisions for the development and maintenance of transportation facilities necessary in connection with the use of public beaches in such State if, in the judgment of the Secretary, such State has defined and sufficiently protected public beaches within its boundaries by State law.

I think maybe if we struck the word "transportation" before facilities so it would read:

*** * * for the development and maintenance of facilities necessary in connection with the use of public beaches * * *.**

Mr. SCHWARTZ. I think that striking that word would do very well what the Oregon Attorney General suggested in the sense that the development and maintenance of facilities is really what Oregon would want since they have already developed their beaches—they might have used their matching fund acquisition to maintain their coastline. That is a very good suggestion and some enlargement of that type to include the suggestion that he made with regard to acquisition of areas upland of the dunes or of the sandy beach which would also be very helpful to us in Texas.

I think that we are acquiring large parks on the Texas coast. We have recently acquired four major State parks on the Texas coast through a State park bond authorization. We have used the Bureau of Reclamation matching funds in some cases for those acquisitions. Any monies to be matched by the State which would give us that acquisition opportunity of upland as well as controverted beaches and beach easements would be very helpful to the public use.

Mr. ECKHARDT. I want to thank you very much Senator for coming up here and giving us the benefit of your views on this, and we will, of course, welcome your continued advice, particularly with respect to this relationship between land use management and the determination of policy with respect to control of beaches, as a matter of law.

Thank you again for your attendance.

The committee will stand adjourned until 2:00 o'clock this afternoon.

[Whereupon, at 12:30 p.m., the committee recessed to reconvene at 2 p.m., the same day.]

AFTERNOON SESSION

Mr. ECKHARDT. The hearing will be resumed, and we have as our next witness Mr. Robert K. Knecht, the Director of the Office of Zone Management, Department of Commerce.

Glad to have you here.

STATEMENT OF ROBERT W. KNECHT, DIRECTOR, OFFICE OF COASTAL ZONE MANAGEMENT, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE, ACCOMPANIED BY THOMAS NELSON, GENERAL COUNSEL'S OFFICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE

Mr. KNECHT. Thank you, Mr. Chairman.

I am glad to be here. I have with me Mr. Thomas Nelson of the General Counsel's office in the National Oceanic and Atmospheric Administration of the Department of Commerce.

We have a prepared statement, and I think it would be most helpful if I went through the statement, because I think it speaks to a number of issues that were raised this morning concerning the applicability of the Coastal Zone Management Act to your general concerns.

Mr. ECKHARDT. Go ahead.

Mr. KNECHT. Fine.

First, we wish to thank you for the opportunity to be here today to testify on behalf of the Department of Commerce and the National Oceanic and Atmospheric Administration concerning H.R. 10394, which would establish a national policy with respect to the Nation's beach resources. Our comments this afternoon also apply to H.R. 4932, another measure designed to accomplish the same purpose.

The National Oceanic and Atmospheric Administration has a keen interest in protection and management of the Nation's coastal areas, including its beaches. That interest stems from the Agency's many responsibilities for marine resources management, including those under the Coastal Zone Management Act we heard cited this morning, the Marine Protection, Research and Sanctuaries Act, the Fish and Wildlife Coordination Act of 1958, the Fish and Wildlife Act of 1956 and others.

We believe that the Nation's beaches represent a unique national heritage and that they afford important recreational and aesthetic opportunities to our population.

However, we do not favor enactment of H.R. 10394. Basically, we believe that the problem of beach access should be dealt with under the provisions of the Coastal Zone Management Act of 1972.

Interpolating here, Mr. Chairman, our position is very similar to that presented by the Department of the Interior representative this morning.

The Coastal Zone Management Act was enacted almost exactly 1 year ago. Through this landmark legislation, the Congress declared a national policy, "to preserve, protect, develop and where possible, to restore or enhance the resources of the Nation's coastal zone for this and succeeding generations."

The act provides for the States to pay the central role in management and protection of the coastal zone, through the development and implementation of management programs to achieve wise use of their respective land and water resources.

A central thrust of the act is that the States, following suitable investigations and studies, public hearings, and determination of their needs and problems, will develop programs for effectively managing their coastal lands and waters.

As the committee knows, the Coastal Zone Management Act provides financial grants to the States for development of coastal zone management programs, and for administration of such programs once developed and approved by the Secretary of Commerce.

Interpolating again, it is similar to the approach being followed in the land use legislation.

The act provides that the States can utilize a variety of regulatory measures to reflect their own requirements in assuring compliance with their program.

We are encouraged to believe that the States will utilize these provisions effectively to increase public access and use of the coastal zone. A number of States have already recognized this need and are moving to meet it.

Not all States, however, perceive the need exactly alike, and accordingly, their responses have varied.

Texas has established public ownership of the State's beach areas up to the vegetation line. State, county, and district attorneys are authorized to bring suit to remove anything obstructing public access to these areas.

Oregon has passed a similar act which gives the citizens the right to unrestricted use of Oregon's beaches up to the vegetation line. Improvements on the beaches can only be undertaken with a permit from the State Highway Division.

The State of Washington has taken a different tack by passage of a Shoreline Management Act. The act calls for local governments to develop comprehensive shoreline use plans within their jurisdiction. Permits are required for shoreline allocation or development.

The State government is responsible for providing criteria for use by the local government in evaluating permits and for establishing permit procedures.

Michigan has taken a similar approach. Its Shorelands Protection and Management Act requires the development of a comprehensive plan for the use and development of its shoreline. The State is to identify high risk erosion and critical environmental areas with subsequent regulation by local government. A State permit system is to be developed to provide control if local agencies fail to act.

Many other coastal States have legislation and/or plans under consideration to afford similar control and protection.

In my prepared testimony I quote from section 302(c) at some length to indicate the concerns that are expressed in the Coastal Zone Management Act. I call your attention to the last part of that phrase, "decreasing open space for public use, and shoreline erosion."

That is one of the items that is specifically addressed in the findings of the Coastal Zone Management Act—passed by the Congress and signed by the President.

Excuse me, but there are parts of my testimony that we can perhaps insert in the complete fashion and I will skip those parts because they refer to this.

Mr. ECKHARDT. Without objection your prepared statement will appear in the record at this point.

[The prepared statement referred to above follows:]

STATEMENT BY ROBERT W. KNECHT, DIRECTOR, OFFICE OF COASTAL ENVIRONMENT, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE

Mr. Chairman and members of the Committee, I wish to thank you for the opportunity to be here today to testify on behalf of the Department of Commerce and the National Oceanic and Atmospheric Administration concerning H.R. 10394, which would establish a national policy with respect to the Nation's beach resources. These comments also apply to H.R. 4932.

The National Oceanic and Atmospheric Administration has a keen interest in protection and management of the Nation's coastal areas, including its beaches. That interest stems from the agency's many responsibilities for marine resources management, including those under the Coastal Zone Management Act, the Marine Protection, Research and Sanctuaries Act, the Fish and Wildlife Coordination Act of 1958, the Fish and Wildlife Act of 1956 and others. We believe that the Nation's beaches represent a unique national heritage and that they afford important recreational and aesthetic opportunities to our population.

We do not favor enactment of H.R. 10394. Basically, we believe that the problem of beach access should be dealt with under the provisions of the Coastal Zone Management Act of 1972.

The Coastal Zone Management Act was enacted almost exactly one year ago. Through this landmark legislation, the Congress declared a national policy "to preserve, protect, develop and where possible, to restore or enhance the resources of the Nation's coastal zone for this and succeeding generations."

The Act provides for the States to play a central role in management and protection of the coastal zone, through the development and implementation of management programs to achieve wise use of their respective land and water resources.

A central thrust of the Act is that the States, following investigations, public hearings, and determination of their needs and problems, will develop programs for effectively managing their coastal lands and waters. As the Committee knows, the Coastal Zone Management Act prvoides grants to the States for development of coastal zone management programs and for administration of such programs once developed and approved by the Secretary of Commerce. The Act provides that the States can utilize a variety of regulatory measures to reflect their own requirements in assuring compliance with their program.

We are encouraged to believe that the States will utilize these provisions effectively to increase public access and use of the coastal zone. A number of States have already recognized this need and are moving to meet it. Not all States, however perceive the need exactly alike and, accordingly, their responses have varied.

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The State of Washington has taken a different tack by passage of a Shoreline Management Act. The Act calls for local governments to develop comprehensive shoreline use plans within their jurisdiction. Permits are required for shoreline allocation or development. The State government is responsible for providing criteria for use by the local government in evaluating permits and for establishing permit procedures.

Michigan has taken a similar approach. Its Shorelands Protection Management Act requires the development of a comprehensive plan for the use and development of its shoreline. The State is to identify high risk erosion and critical environmental areas with subsequent regulation by local government. A State permit system is to be developed to provide control if local agencies fail to act.

Many other coastal states have legislation and/or plans under consideration to afford similar control and protection.

The Coastal Zone Management Act, while providing for development of State programs, reflects this national interest as well. The Congressional findings embodied in the Coastal Zone Management Act clearly recognize that effective coast zone management will address the critical need to protect beaches as well as other features of the zone. Section 302(c) states "The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal, and harvesting of fish and shellfish and other living marine resources, have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion."

The Secretary of Commerce, in reviewing and approving State coastal zone management programs must assure that these programs conform with the national interest in the coastal zone, expressed in the Act.

As one of the requirements for approving a State program, the Secretary must determine that it includes procedures whereby specific areas may be

designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, or esthetic values. He must also find that the program provides a method of assuring that local land and water use regulations within the coastal zone do not unreasonably restrict or exclude land and water uses of regional benefit. We believe that both these provisions, seen within the context of the overall policy statements in the Coastal Zone Management Act, indicate general guidance to the effect that State programs should make adequate provisions for public use and enjoyment of coastal areas. This, in our judgement, includes adequate provision for public access to beaches.

Initial funding of 5 million dollars to begin implementation of the Act in FY '74 has been sought by the Administration and appropriations by the Congress are anticipated shortly. The initial grants under this funding are expected to be made starting in February 1974. The Department of Commerce and NOAA are now actively engaged in administration of the Act. Procedural regulations were published in the Federal Register on June 13, 1973. We have under intensive study questions of defining national interest as a basis for the Secretary's review and approval of State coastal zone management programs. Guidelines for Secretarial approval of State programs are now in the initial stages of development. These guidelines will be discussed in a series of public hearings and will be submitted for comment in the Federal Register before they become final. Through this process, we hope to be able to address fully the public access issue, and the extent to which it must be considered in meeting the intent of the Coastal Zone Management Act.

The proposed legislation, H.R. 10394, would essentially restrict the States to specific approaches and requirements concerning public access to beaches. It would leave little to State discretion. We believe that it would be preferable to allow State development of coastal zone management programs subject to broad overall Federal guidelines, to proceed as envisioned by the Coastal Zone Management Act. Among our specific concerns with the proposed legislation is the fact that Section 203 would appear to unduly restrict legitimate private property uses and activities of landowners, since it could apply to all construction or development which in any way could impede a person's access to the beaches, regardless of the degree of that impediment, or available alternatives, and how far away from the public beaches the construction is located.

The relation between the Federal and State governments in the process of easement acquisition is not well established. Condemnation of easments would apparently be a Federal function, yet States appear to be required to pay 25% of the cost of such easements. This would appear to call for shared financing, but not shared decision making. The legislation does not specify how the program, to be administered by the Department of the Interior, would relate to approved State coastal zone management programs.

In summary, Mr. Chairman, while we favor public access to beaches and believe this is a legitimate national need, we believe that the mechanism for addressing that need in an effective manner, taking into account the respective responsibilities of both State and Federal governments, has been provided in the Coastal Zone Management Act of 1972. We would recommend that the provisions of the Act, which are just now being implemented, be allowed to function.

The Department of Commerce and the National Oceanic and Atmospheric Administration will be cognizant of the need for increased public access to beaches in reviewing State coastal zone management programs as they are developed. Under the Coastal Zone Management Act we are required to submit an annual report to the Congress which will summarize the progress in implementation of the Act, and identify any problems which may have arisen. This report will, therefore, provide a mechanism through which the Congress can assess the extent to which provision for public access to beaches is being adequately addressed. If it is found that public access to beaches cannot be adequately addressed in the coastal zone management process as currently authorized, we would recommend that appropriate procedural or policy adjustments to the Coastal Zone Management Act be considered at that time.

I will now attempt to answer any questions that you and your Committee may have.

Mr. KNECHT. In addition to the States that I mentioned many other coastal States have legislation and plans under current consideration that afford similar control and protection.

The Coastal Zone Management Act, while providing for development of State programs, reflects this national interest as well. The congressional findings embodied in the Coastal Zone Management Act clearly recognize that effective coastal zone management will address the critical need to protect beaches as well as other features of the zone.

The Secretary of Commerce, in reviewing and approving State coastal zone management programs must assure that these programs conform with the national interest in the coastal zone, expressed in the Coastal Zone Management Act.

As one of the requirements for approving a State program, the Secretary must determine that it includes procedures whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, or aesthetic values. He must also find that the program provides a method of assuring that local land and water use regulations within the coastal zone do not unreasonably restrict or exclude land and water uses of regional benefit.

We believe that both these provisions, seen within the context of the overall policy statements in the Coastal Zone Management Act, indicate general guidance to the effect that State programs should make adequate provision for public use and enjoyment of coastal areas.

This, in our judgment, includes adequate provision for public access to beaches.

I would like to bring you up to date at this point, Mr. Chairman, on the status of the coastal zone management program, and how we think it will be effective in this matter.

Initial funding of $5 million to begin implementation of the act in fiscal year 1974 has been sought by the administration, and appropriations by the Congress are anticipated shortly. The initial grants under this funding are expected to be made starting in February 1974.

The Department of Commerce and NOAA are now actively engaged in administration of the act. Procedural regulations were published in the Federal Register on June 13, 1973.

We have under intensive study at the present time questions of defining national interest as a basis for the Secretary's review and approval of State coastal zone management programs.

Guidelines for Secretarial approval of State programs are now in the initial stages of development in our office. These guidelines will be discussed in a series of public hearings, and will be submitted for comment in the Federal Register before they become final.

Through this process, we hope to be able to address fully the public access issue, and the extent to which it must be considered in meeting the intent of the Coastal Zone Management Act.

And now to some concerns with regard to H.R. 10394.

The proposed legislation, H.R. 10394, would essentially restrict the States to specific approaches and requirements concerning public access to beaches. It would leave little to State discretion.

We believe that it would be preferable to allow State development of coastal zone management programs subject to broad overall Federal guidelines, to proceed as envisioned by the Coastal Zone Management Act.

Among our specific concerns with the proposed legislation is the fact that section 203 would appear to unduly restrict legitimate private property uses and activities of landowners, since it could apply to all construction or development which in any way could impede a person's access to the beaches, regardless of the degree of that impediment, or available alternatives, and how far away from the public beaches the construction is located.

The relation between the Federal and State governments in the process of easement acquisition is not well established. Condemnation of easements would apparently be a Federal function, yet States appear to be required to pay 25 percent of the cost of such easements, so this would appear to call for shared financing, but not shared decisionmaking.

I think this point was mentioned at some length this morning.

Mr. ECKHARDT. I really do not understand how either you or the other departments construed it, but if that is so, I would be the first to seek amendment to the legislation.

Mr. KNECHT. The legislation does not specify how the program, to be administered by the Department of the Interior, would relate to approved State coastal zone management programs.

In summary, Mr. Chairman, while we favor public access to beaches, and believe this is a legitimate national need, we believe that the mechanism for addressing that need in an effective manner, taking into account the respective responsibilities of both State and Federal governments, has been provided in the Coastal Zone Management Act of 1972.

We would recommend that the provisions of the act, which are just now being implemented, be allowed to function.

The Department of Commerce and the National Oceanic and Atmospheric Administration will be cognizant of the need for increased public access to beaches in reviewing State coastal zone management programs as they are developed and submitted to the Department of Commerce.

Under the Coastal Zone Management Act we are required to submit an annual report to the Congress which will summarize the progress in implementation of the act, and identify any problems which may have arisen.

This report will, therefore, provide a mechanism through which the Congress can assess the extent to which provision for public access to beaches is being adequately addressed. If it is found that public access to beaches cannot be adequately addressed in the coastal zone management process as currently authorized, we would recommend that appropriate procedural or policy adjustments to the Coastal Zone Management Act be considered at that time.

We think that the question of access to public beaches is an important question. It is a question that has a large component of national interest involved in it.

We think further, though, that the mechanism that already exists, the Coastal Zone Management Act, provides adequate incentives to encourage the States to take necessary action, administrative or legislative, and to make further progress toward improving public access.

Mr. ECKHARDT. Thank you very much.

Sir, I would like to ask a few questions with respect to your interpretation of the bill.

On page 6 of your statement you say, "proposed legislation would essentially restrict the States as to specific approaches and requirements concerning public access to beaches."

Well, now, let us consider several States in this approach.

In the case of the State of Texas, there is a statute very much like the national statute, and the method that has been used for enforcement has not yet had to use the presumption of the prima facie showing contained in that bill.

But, in the case of Galveston Island, which is the case in which the *Seaway* case arose, the State proved by considerable evidence that the beach had been used over a long period of time in order to support, as the court held, both implied dedication and prescriptive right, I think placing the major emphasis on the former.

Of course, obviously, this act would not interfere with the State of Texas, because it is patented after the State's law.

Now, in the State of Oregon, a law similar to that of Texas was initially passed. And as the Attorney General stated, it differs in some respects.

I think he stated it did not include the presumption. Then the State proceeded somewhat like the State of Texas with the Attorney General having been given authority to protect the people's right.

The Attorney General went into court and obtained the determination by the court that was right by custom, derived from concepts of ancient law, law going back to time immemorial in the use of the beaches, as the Attorney General pointed out to people of Oregon who have always felt that the beaches were theirs.

They apparently brought in evidence to this effect and established something a little bit different than the prescriptive right of an implied dedication.

So they repealed the old law, and they enacted a new law which largely restates the result of the *Hay* case.

So the law of Texas and Oregon are quite different.

Their theories to the protection of beaches is different.

Now, the State of New Jersey is apparently developing a kind of concept based on public trust which, again, is a different approach to the total picture of people's right to the beaches.

I do not think New Jersey has any specific laws defining beaches or setting out any guidelines with respect to beaches. And, indeed, unless the law has changed considerably since 1967, and I asked the Library of Congress to analyze these laws—there was, I think, at that time, no State of Texas and probably the State of Oregon that hardly even attempted to define the area subject to public right.

There was case law, of course, in many States, but the case law went in almost every case to the question of natural fee title and not to the question of the right of public use. And, of course, there is a body of law in New England that more or less follows colonial ordinances concerning the use of what they frequently call the flask adjacent to waters.

All of these are different approaches, and the ultimate results may be different with respect to that which cannot be used by the public as against a littoral landowner's title.

But, now, as I read this bill and, frankly, as I attempted to draft it, any of those theories could exist and could ultimately decide the right of littoral owners in the use of his land and the exercise of his title against a claim of the public.

Now, I just cannot see how, under those circumstances, you can say that the proposed legislation would essentially restrict the States to a specific approach and requirement concerning public access to beaches.

Mr. KNECHT. Well, let me make a brief reply, and then I would like to ask the representative of our General Counsel's office to comment more fully.

I do not have a legal background, so I cannot engage in quite the same kind of dialog that I think you had this morning with the representatives of the Interior Department on the legal subtleties involved.

But, the proposed legislation attempts to define beaches in the rather specific manner. For example, I think public beaches are defined to extend upward—landward, to the vegetation line, or 200 feet from the mean high water line, or to a discernible vegetation line.

But would that not be a definition that would tend to apply to all States, and might it not be appropriate to all States because of differing geophysical and biological situations, as an example?

Mr. ECKHARDT. There is no question but that the definition is difficult to draw—to apply to all States. But I think we were able to draw the beach, as defined in 201(3), in the case of typically sandy or shell beach with a discernible vegetation line, which is constant or intermittent, it is that area which lies seaward from the line of vegetation to the sea, and (b) in the case of a beach having no discernible vegetation line, the beach shall include all area formed by wave action, not to exceed 200 feet in width, measured inland from the point of mean higher high tide.

Now, there are, of course, several kinds of beaches as the type of beach that just perhaps is most typical in the United States, like all of that other Texas shore, mostly on islands and peninsulas, the same is generally true of a good many of the Southern Atlantic beaches and the beaches running down into Florida, and the gulf coast beaches of Florida, the beaches along the Southern States bordering on the gulf.

Now, that would all be covered by (a).

There are, however, situations within this category in which it is difficult to ascertain where the vegetation line is.

For instance, at the end of Galveston Island, where the sea has swept all away across the island and other places where, due to

artificial disturbances with the dunes, or perhaps due to severe storm action on a narrow island or peninsula, there may be areas where the sand dunes are eliminated. And there, of course, what you do is find a point of elevation at each side of the obliteration, and you reconstruct the line that would constitute that level.

And, secondly, you have a kind of beach that is typified, I think, by the upper New England coast, the stony beach with very little sand, or at least the coast is so rocky that it is more or less unaffected by the sea.

And I suppose the third type would be the rather high cliffs on parts of California's coast, not unlike the Scottish or English coasts or the North Sea.

That is the reason it was necessary to put (b) in because (a) is not very applicable to that situation. But I think that there is some reason why we ought to be trying to define what we are talking about.

We are talking about a public right, and I could not accept the proposition that this is impossible of delineation.

I certainly accept the proposition that it might be better clarified, but there has been a very sincere attempt to do so, frankly, if you will notice the Texas law as against this.

Some of the imperfections for that law, I think, were perfected.

Mr. KNECHT. Right.

We would certainly agree there is a need to attempt to define the public rights on the beach. I think the main issue is where can that best be done and where should it be done, at the State level or Federal level.

Mr. ECKHARDT. The trouble is, though, the States have not done it.

When I had this report made, as I say, I think only Texas had defined the beach.

As a matter of fact, in the case law until the case of the *Seaway* case, and the two California cases and the *Hay* case in Oregon, until that time, there hardly had been any differentiation between the question of right to use of the beach, the question of actual fee ownership.

I really find very, very few cases before *Seaway* that even recognize the possibility of a difference.

Mr. KNECHT. Undoubtedly true, Mr. Chairman, but I think times are about to change.

From our perspective, we hope that the new Federal legislation, the Coastal Zone Management Act, will accelerate and encourage that change.

And, in fact, that is one of the stated objectives.

Would it be helpful if I were to give a brief description of what we are now doing with the States and how it might directly affect the program?

Mr. ECKHARDT. Certainly.

Mr. KNECHT. As I mentioned in the prepared statement, it is expected that funding is about to be forthcoming, to begin the grant program to States this year.

There are 30 coastal States, including the Great Lakes States, and 20 of those States have indicated that they are coming forward in the current fiscal year to apply for grants to begin the program.

Now, the statute lays out very clearly what the State has to do to succesfully complete the program.

One of the questions that they are to consider is public access to beaches in developing a management program to implement those State plans.

It seems to me that the testimony by the attorney general of Oregon was very clear on that point. The need now is for planning and management in the coastal areas.

Mr. ECKHARDT. May I interrupt you just a moment at that point?

The reason for that in Oregon is that Oregon has established the people's right to the very beach that we are discussing here.

Now, at the point where the people's right is established, the planning and management and access becomes important.

The same thing is true with respect to Galveston Beach, but let us suppose that the Texas Open Beaches Act never passed, and the *Seaway* case had never been brought.

Of course, the Attorney General went into the *Seaway* case, because he was directed to protect the public right by virtue of the Texas Open Beaches Act.

But had that not been brought, what was happening on Galveston Beach was the building of barriers that went, as I think I described earlier, right into the sea.

Now, once this occurred, and once it has continued for a period of time, just as it has in parts of Florida, then there is no beach to get access to in all the land planning that you want to put into effect.

I do not disagree with you at all that the State should be encouraged in planning and enforcing access. But it seems to me that every example you have given is a situation in which there is some beach to get to.

I wonder if you would be able to give us some statistics as to what has happened with respect to beaches practically available for public use over some period of time?

Is it increasing?

Is it diminishing?

To what effect is planning affecting diminution or increases?

Give us any information that would indicate that.

Mr. KNECHT. I do not have good statistics on that, but perhaps we could try to provide that for the committee.

My intuitive feeling would be that there has been a decrease in many visible locations due to intensive recreational development, commercial development in coastal areas.

At the same time, however, through the national seashore programs and other Federal and State programs, there have been additional public acquisitions, and I am not sure that one will not offset the other in total.

But I do not have numbers to back that up.

Mr. ECKHARDT. Well, take the Texas beach in this respect.

We have acquired Padre Island, which is a very substantial stretch of beach, but it is a relatively small proportion of the total beach affected by the Texas Open Beaches Bill.

The thing that has really made the beach available has been the determination that the people have a right, as a matter of law, to existing beaches.

I would suspect that the *Hay* decision in Oregon, and I believe the two cases in California and the *Seaway* case in Texas, which only applied to Galveston Beach, were construed to be applicable to much more of the beach and that, therefore, prevented entrenchment on it.

But I would be willing to bet almost any amount of money that those legal decisions constituted a vast acquisition of land for public use far beyond that which had obtained by actual purchase of seashore area.

Mr. KNECHT. Let me speak directly to that point.

Why do I think that the Coastal Management Act will provide incentives to the States that have not yet clarified the legal situation?

What the States have to do under the act is to develop a management program for their coastal areas. First they must articulate goals and objectives for their coastal areas.

These goals will not only involve improved water quality, improved land and water management in general, but other specific goals.

We will urge them to set quantitative goals with respect to increased public access.

The State has to demonstrate that it has the wherewithal and the legislative framework to implement its proposed management program.

It has to withdraw from local governments—in some instances, those powers over the regulation of decisions of more than local interest, and it must show that it has a working system of land and water use controls.

When the program has been approved by the Secretary of Commerce, the operation of that approved program will be funded in part by the Federal Government.

Now, you can ask what incentive will be provided by having an approved program?

Federal action, either direct action by the Federal Agency or action licensed by the Federal Government, has to be consistent with the States approved management program.

This gives the State much increased leverage, we feel, in dealing with the Federal Government with regard to the destiny of the coastal area.

This is the same type of leverage that is involved in the Land Use Act that is pending.

We think the incentives will be there for a State to set goals for increased public access, and then follow through with the necessary State legislation to achieve it.

Mr. ECKHARDT. Let me quickly say that I think the program is a most worthwhile program, and I certainly did not wish to disparage that in any of the statements I made.

The only point I was trying to make is that it seems to me you have two problems.

One is the problem of legal right access to that which, at least some claim belongs to the public in the first place and has been illegally trespassed upon.

Now, that is the kind of thing that this bill and the Texas statute and Oregon statute and the common law approach, and the matter that California addresses itself.

On the other hand, coastal management, although it may encourage this byproduct, largely moves in afterwards, it seems to me, and provides guidelines with respect to using that which is the State established some type of control over, either by ownership or by zoning or by any other means. And I cannot see for the life of me how these two things conflict with each other.

It would seem to me, on the other hand, they are supportive of each other, and I feel they rather fill different needs.

I agree with you there is a perfectly legitimate argument that we should not move as far with respect to that first goal federally as this bill goes, and that perhaps we should simply wait and let the States move.

But my difficulty with that conclusion is that I think statistics will show advancements upon public right have run at a much higher pace than the protection of the public right.

Now, if I am wrong about that, we ought to be able to develop the facts on the matter and that is the reason I suggested that perhaps, after this hearing, you might give us some statistics that would indicate those present.

Mr. KNECHT. We will certainly endeavor to do that. I agree with the main point that you are making.

[The information follows:]

PUBLIC AND PRIVATE SHORELINE OWNERSHIP AND CHANGE

We have endeavored to obtain information on the relative public and private shoreline ownership and change thru time. Three data bases were located. The first is the Report of the Outdoor Recreation Resources Review Commission made in 1962. This is used for historical comparison in our response. The second source is the National Shoreline Study, of 1971 by the Army Corps of Engineers. The third source is NOAA's data used in mapping and charting activities.

Table 1 highlights the problem. (Note that we have not included data for all coastal states but rather have used the Northeast for illustration purposes.)

For any given state the three data bases differ in the basic statistic of total shoreline. This obviously complicated making a comparison of changes in ownership status from 1962 to present. Nevertheless we have made a comparison between 1962 and the present by expressing the private holdings as a percent of the total shoreline for each data base. Utilizing this system, Table 2 illustrates that apparently public ownership has increased over the past decade.

TABLE 1.—NORTHEAST STATES SHORELINE

State	Shoreline				
	Total miles			Private	
	ORRC-1962 [1]	CORP-1971 [2]	NOS [3]	ORRC-1962	CORP-1971
Maine	2,512	2,500	3,478	2,578	2,420
Maryland	1,368	1,939	3,190	1,252	1,679
Massachusetts	649	1,200	1,519	631	935
Virginia	692	1,095	3,315	664	769
New York (Atl.)	1,071	633	1,850	1,024	402
Rhode Island	188	340	384	170	280
New Jersey	366	469	1,792	333	272
Connecticut	162	270	618	153	215
Delaware	97	216	381	79	168
New Hampshire	25	40	131	22	28

[1] Outdoor Recreation Resources Review Commission Report, 1962.
[2] The National Shoreline Study Report, August 1971.
[3] The Coastline of the United States, NOAA/PI 71046, 1971.

TABLE 2.—NORTHEAST STATES SHORELINE CHANGE IN PRIVATE OWNERSHIP

State	Shoreline percent private	
	ORRC-1962	CORP-1974
Maine	98.7	96.4
Maryland	91.5	86.5
Massachusetts	97.2	77.9
Virginia	95.9	70.3
New York (Atl.)	95.6	63.0
Rhode Island	92.8	82.3
New Jersey	90.9	57.9
Connecticut	94.4	79.6
Delaware	81.4	77.7
New Hampshire	88.0	70.0

Mr. KNECHT. On the question of sequence, which comes first, the establishment of the public right and then the planning and management, or vice-versa.

It seems to me, in listening to the Attorney General of Oregon, that their situation would have been easier had they had the planning and management prior to the increased recognition of the rights, perhaps because now they have some real problems to deal with in the unsatisfactory and unsuitable developments that have taken place.

Mr. ECKHARDT. I think there is one though that was not really brought out in the colloquy concerning Oregon.

Oregon is somewhat a peculiar question—I mean, it is not an area with a tremendous population pressures on beaches as, for instance, is the case in New York and New Jersey, and to a little lesser extent, in Florida and other Atlantic State beaches. And again to another lesser extent, on Oregon and the Texas beaches, particularly those up around more populated areas from all the way from Beaumont, Orange, in that area, down through Houston and Freeport.

Now, Oregon may have had a little more leeway, and perhaps the reason they have done such a good job is because they have problems, or their problems were not so gigantic. And the thing that worries me is that if we do not move in at a proportionately early time in its history, because its problem had not developed, we do not move in pretty quickly with some kind of positive action to protect public rights, or so assign someone the authority and the responsibility to do it, we may find the beaches gone before we get to plan about them—before we get to develop access to the beaches.

And access can only be to beaches if the public has a right to go to them.

As soon as the public has a right to go to the beach, which may have diminished sufficiently, I suppose we can easily buy access to what remains, but it will be infinitestimal compared to the national need.

Mr. KNECHT. Well, I certainly support your concerns.

Legislation of this type has been before the Congress for the last 3 years, and so maybe the time scale we are talking about is a similar time scale.

I am hopeful, within the next 2 years, we will know the extent to which my prediction is correct, and that is to say, the extent to

which coastal zone management has acted as a stimulus to the remaining States to move in this area.

Annual reports are called for to the Congress, and they will contain a clear statement as to what kind of progress is being made. And if within a couple of years, we do not see adequate progress using the coastal management act as the instrument, additional legislation could well be considered.

Mr. ECKHARDT. Incidentally, I want to compliment you about your critical reference to section 203. I think you are perfectly correct that the language of 203 is too broadly drawn.

203 really intends as a supplement to the rest of the bill, and it was intended as relating to construction of barriers and restraints, essentially at or on the area subject to public right.

It was not restricted specifically to areas at or on that particular place because it was thought that certain barriers closely adjacent to them might well be included technically if there were prescriptive or customary rights to use those ways to the beach.

However, I think your point is well taken, that the language, at least, is broad enough to deal with for instances.

It might imply the person had to make available the right of way across, say, acres of private land to get to the beach.

This is addressed much more specifically in the Texas act in that the Texas act makes it very clear that the provision does not require the making available access to the beach across areas that are not already public or charged with a right of entry.

Of course, in a Federal act of this type, it would behoove the precise meaning of perfecting that provision which would be left to the States themselves.

I agree much of this should be a State matter, and whatever statute might be passed federally should have considerable flexibility for a multitude of State approaches.

It might be quite different from each other, but I think your point is certainly well taken.

Mr. KNECHT. Thank you.

Mr. ECKHARDT. Did your colleague have any remarks?

Mr. NELSON. No, I did not.

Mr. ECKHARDT. Thank you, very much.

Mr. KNECHT. Thank you for the opportunity, and again, we commend your interest in this important problem and especially your pioneering work in Texas in your early role.

Mr. ECKHARDT. Thank you, sir.

Mr. NELSON. Mr. Chairman, I might ask, I understand you have a law review in the Syracuse Law Journal this last summer; is that correct?

Mr. ECKHARDT. That is right.

That is volume 24, No. 3, summer of 1973.

Mr. NELSON. Thank you, very much. I am a little behind in my reading.

Mr. KNECHT. Thank you, very much.

Mr. ECKHARDT. There has been some reference to my law review article. Without appearing presumptuous I might say if it is not

objectionable it should be entered in the record at this time. The Chair hears no objection.

[The article follows:]

[Syracuse Law Review, Vol. 24, No. 3, summer 1973]

(Congressman Bob Eckhardt (D.-Texas) has recently proposed national legislation to ensure the American public's right to enjoy ocean front lands. The Eckhardt bill, H.R. 4932, guarantees, consistent with property rights of littoral landowners, free and unrestricted public use of ocean beaches. In the following article, Congressman Eckhardt makes the case for his open beaches proposal, discussing the common law of beach ownership and, particularly, recent developments in Texas, Oregon and New Jersey which he believes lend support to his bill)

A Rational National Policy on Public Use of the Beaches

(Robert C. Eckhardt*)

I. The Problem Raised

There has been a continuing encroachment on what has been in the past tacitly accepted as a public right to access to the sea and enjoyment of the shore. Such encroachment runs directly counter to an intensified public need for the beaches.[1] It is the burden of this paper to show that, from both a legal and a legislative point of view, such public need should be considered the paramount interest involved. Thus, the legal basis for encroachment should be closely and critically examined and, where encroachment is not shown to be justified in law, it should be judicially halted. In addition, a free and unrestricted right to public use of the beaches as a common should be legislatively protected to the full extent that such may constitutionally be done.

At the outset it should be understood that what has been recognized in the past as a public right to access to the sea has depended at various times and places on (a) what land is involved, (b) the nature of the use by the public, and (c) the extent to which "the people" and "the sovereign" are considered as separable or merged.

A. What land is involved

Three zones are involved. Though there are refinements in definition which make the labels inexact when they are applied in various jurisdictions at various times, it is convenient to refer generally to (1) *the sea* as the area seaward of mean low tide, (2) *the foreshore* as the area between mean high and mean low tide, and (3) *the dry sand beach* as the area from mean high tide to the vegetation line.

Law with respect to control of the bed of the sea by the sovereign is, with respect to all matters pertinent to this discussion, free from controversy. It is clear that the sovereign, as opposed to any littoral landowner or any member of the public, may hold, control, and mine such area just as an owner of dry-land property might exercise the same rights of proprietorship.

The foreshore (or wet sand area, or tidelands, as this area is sometimes designated) has historically been considered *just publicum*. It is held by the sovereign, not as personal property, but in trust for the benefit of the public. Thus, the line between private and public ownership generally may be placed at the landward border of the foreshore.[2] The normal common law rule

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[1] "Remaining tidal water resources . . . [still in the ownership of the State] are becoming very scarce, demands upon them, by reason of increased population and industrial development are much heavier, and their importance to the public welfare have become much more apparent." New Jersey Sports and Exposition Authority v. McCrane, 61 N.J. 1, 55, 292 A.2d 545, 579 (1972). Neptune City v. Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972).

See also Note, *Public Access to Beaches*, 22 Stan. L. Rev. 564 (1970).

[2] Except that Maine, Massachusetts, and New Hampshire, following a colonial ordinance, draw their line between private and public ownership at low water or 100 rods seaward of high water whichever area is less; and Virginia, Delaware, and Connecticut set the line at low water.

puts this boundary at the mean tide line.[3] There are variations, depending on the basic land law as to what "high tide" is meant.[4]

Thus, it may be seen that the foreshore is generally conceded to be available for public use.[5] Even if the free title to the foreshore is granted by the sovereign to private owners, since the sovereign holds the land in trust for the public, such grant does not divest the public, under the common law concept, of its traditional right of use.[6]

B. The area in controversy: the dry sand beach

Therefore, the area primarily in question is the dry sand beach. This is the area in which the conflict arises between the littoral owner, attempting to occupy the area to the exclusion of the public, and the public, attempting to assert a right of traditional or long accepted usage.

Because it is this area that is primarily in dispute, and because this area is more difficult to define than the other two, a definition of its landward boundary is appropriate here. Roughly the line of vegetation may be said to be the extreme seaward boundary of natural vegetation which typically spreads continuously inland. It includes the line of vegetation on the seaward side of dunes or mounds of sand typically formed along the line of highest wave action. Of course, there are problems in specific cases, which could arise both in court action or in application of a statutory definition, which would have to be resolved, but these are not beyond the competence of the court or the legislative body to define.[7]

C. The nature of the use by the public

The use by the public with which we are concerned here is that related to *access to the sea*. We are not concerned with other uses which generally derive from ownership of fee title to land. But the term *access to the sea* is used here as a term of art. Its meaning is not restricted to travel from the shore *into* the sea. Rather, the term encompasses enjoyment of the sea and its fringes in reasonable and traditional ways. Seafarers and fishermen have traditionally used the beach to land their boats and dry their nets.[8] Nor has the traditionally use been limited to seafaring folk. The beach has been used as long or longer by landsmen as a source of shellfish,[9] as a mode of travel, and as a place to sunbathe and generally to enjoy the sun and surf.[10]

Thus, the nature of the use to which a right of access to the sea attaches is delimited by that general kind of use which has roots in tradition. The fact

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[3] Not only do the states which adopt the normal common-law rule apply this boundary but also several states whose law is affected by the Spanish and Mexican grants, Alabama, California, and Florida, do so.

[4] Thus, in Texas, grants made before January 20, 1940, are good only to mean higher high tide. Later grants of littoral land by Texas follow the common-law rule.

[5] For instance, in State *ex rel* Thornton v. Hay, 254 Ore. 584, ——, 462 P.2d 671, 673 (1969) it was said: "Below, or seaward of, the mean high tide line, is the state-owned foreshore, or wet-sand area, in which the landowners in this case concede the public's paramount right, and concerning which there is no justiciable controversy."

[6] Martin v. Waddell, 41 U.S. 367, 413 (1842).

[7] The definition in H.R. 4932, 93d Cong., 1st Sess. (1973), appears to reach most if not all situations, though such a task is not without difficulty. Hearings on the bill, which are scheduled to commence in summer 1973, will be helpful. The pertinent language is as follows:

"(3) 'Beach' is the area along the shore of the sea affected by wave action directly from the open sea. It is more precisely defined in the situations and under the conditions hereinafter set forth as follows:

"(A) In the case of typically sandy or shell beach with a discernible vegetation line which is constant or intermittent, it is that area which lies seaward from the line of vegetation to the sea.

"(B) In the case of a beach having no discernible vegetation line, the beach shall include all area formed by wave action not to exceed two hundred feet in width (measured inland from the point of mean higher high tide.)

"(4) The 'line of vegetation' is the extreme seaward boundary of natural vegetation which typically spreads continuously inland. It includes the line of vegetation on the seaward side of dunes or mounds of sand typically formed along the line of highest wave action, and, where such a line is clearly defined, the same shall constitute the 'line of vegetation.' In any area where there is no clearly marked vegetation line, recourse shall be had to the nearest clearly marked line of vegetation on each side of such area to determine the elevation reached by the highest waves. The 'line of vegetation' for the unmarked area shall be the line of constant elevation connecting the two clearly marked lines of vegetation on each side." [The bill then goes into a detailed description of how to extend and connect the points involved.]
H.R. 4932, 93d Cong., 1st Sess. §§ 201(3), (4) (1973).

[8] Blundell v. Catterall, 106 Eng. Rep. 1190 (K.B. 1821).

[9] Peck v. Lockwood, 5 Conn. (Day) 22 (1811).

[10] White v. Hughes, 130 Fla. 54, 58–59, 190 So. 446, 450 (1939).

that a cart has been replaced by a wagon, then an automobile, does not alter the traditional nature of the use.[11] The important point is that the beach has been used for certain sea-related activity as far back as the memory of man reaches.

D. What area is subject to use

But how far landward does this traditional use extend? Does it include the dry sand beach? I think it may reasonably be considered to do so unless the facts and law relating to a specific situation rebut the reasonableness of that proposition in a specific case. Reasonable guidelines, limitations and rules of evidence can be proved statutorily.[12]

For centuries men have used the beach in the manner described above without making a precise distinction between the wet sand beach and the dry sand beach.[13] Indeed, most of the traditional uses of the shore, if permissible only as to the tidelands or wet shore, could not be enjoyed at all at high tide. Furthermore, the line between the foreshore and the dry sand beach is not clearly marked on the land, nor is it as constant, as is that between the beach and the uplands.[14] It is this latter boundary which is recognizable and meaningful as respects *use* as distinguished from *ownership*.

But, as noted above, only certain uses are within the classification of uses traditionally relating to access to the sea. Others must follow ownership. Thus, one asserting a right to public use may bring with him a shovel and build a sand castle but not a drilling rig and drill an oil well.

E. The people and the sovereign

When the Texas Supreme Court in *Luttes v. Texas*[15] expounded the proposition that the littoral owner owned the land seaward to the point of mean higher high tide and therefore could drill and take oil in the foreshore, littoral owners of land bordering the Gulf of Mexico interpreted the decision to mean that they could do whatever else they wanted to do with the foreshore, including based upon two assumptions: (1) that the people's right to use the foreshore is somehow merged with the sovereign's ownership right, and (2) that if the lands in question are not owned by the sovereign but have passed by grant and transfer to a littoral landowner, the people's right of access to the sea has been obliterated.

These points are insupportable. A correct view, I think, is stated under the following two propositions which are briefly discussed.

1. The people's right to access to the sea exists independently of the sovereign's ownership of lands "flowed by the tide."

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[11] Seaway Co. v. Attorney General, 375 S.W.2d 923, 932–34, (Tex. Civ. App. 1964).

[12] For instance, the pertinent Texas statute provides: (Sec. 2. In any action brought or defended under this Act or whose determination is affected by this Act a showing that the area in question is embraced within the area from mean low tide to the line of vegetation shall be prima facie evidence that:

"(1) the title of the littoral owner does not include the right to prevent the public from using the area for ingress and egress to the sea;

"(2) there has been imposed upon the area subject to proof of easement a prescriptive right or easement in favor of the public for ingress and egress to the sea."
TEX. STAT. ANN. § 5415(d) (Vernon Supp. 1972).

[13] Various expressions are used in the common law cases to describe the landward extent of the area subject to the traditional use of the beach: "[L]ands flowed by the tide" [Shively v. Bowlby, 152 U.S. 1, 57 (1894)]; "lands over which the tide flows" "the full seamark" [Bagott v. Orr, 126 Eng. Rep. 1391 (1801)] (expression used and the "flux and reflux of the sea" [Peck v. Lockwood, 5 Conn. (Day) 22 (1811)]; in argument); "land adjoining the sea" [Blundell v. Catterall, 106 Eng. Rep. 1190 (K.B. 1821)].

Civil Law expressions are similarly more poetic than exact: "place . . . covered by the water of the [sea], however most it grows in all the year, be it in time of winter or of summer" [Las Siete Partidas, Lopez ed. pub. in 16th C., Spanish text: ". . . todo aquel lugar es llamado ribera de la mar quanto se cubre el agua della, quanto mas crece en todo el ano, quier en tiempo del inuierno o del verano." Luttes v. State, 159 Tex. 500, ———, 324 S.W. 2d 167, 177 (1958)].

[14] State *ex rel.* Thornton v. Hay, 254 Ore. 584, ——, 462 P.2d 671, 674 (1969). *See also* Corker, *Where Does the Beach Begin and to What Extent is This a Federal Question*, 42 WASH L. REV. 33, 66 (1966): ". . . . Even in terms of certainty, vegetation line appears to be superior in some locations to mean high tide line. One can look at the vegetation and in many instances approximate a line. Not even the Coast and Geodetic Survey can be sure without great effort, as the history of Los Angeles harbor demonstrates, what is tide, what is seiche, and what is the product of a prevailing offshore wind."

[15] Luttes v. State, 159 Tex. 500, 321 S.W.2d 167 (1958).

The point is very well put in Hargrave's Law Tracts, quoted in the old English case of *Bagott v. Orr:* "In the sea the King [of England] hath a double right, namely a right of jurisdiction, which he ordinarily exerciseth by his admiral, and a right of propriety or ownership. The King's right of propriety or ownership in the sea is evidenced principally in these things that follow: 1st, The right of fishing in this sea and the creeks and arms thereof is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river. But though the king is the owner of this great waste, and in consequent of his property hath the primary right of fishing in the sea, and the creeks and arms thereof, *yet the common people of England have regularly a liberty of fishing in the sea, or creeks or arms thereof as a public common . . . and may not without injury to their right be restrained of it* unless in such places, creeks, or navigable rivers where either the king or some particular subject hath gained a propriety exclusive of that common liberty."[16]

This common law concept is the basis of the doctrine of *public trust*,[17] but the old cases do not define precisely that area to which the public trust applies. Perhaps it is well that precise delineation is *not* made, because such should be sufficiently flexible to comport with public needs at the given time and under the facts of the case.

2. That bundle of sticks that we call "title" which has passed by grant and transfer to the littoral owner does not necessarily include the right to override traditional public usage associated with access to the sea.[18]

Thus, it may be seen that the legal question involved is not at all settled by answering the query: Who *owns* title? That is what *Luttes* decided in a manner favorable to the littoral owner. It is also what the Supreme Court of Washington decided in *Hughes v. State*[19] in an exactly contrary way. Of course, if a modern sovereign *owns* the area in question—as, for instance, the dry sand beach—the public, acting directly or through the state, is entitled to its enjoyment. Thus, in holding that the State of Washington owned its ocean front lands back to the line of vegetation, the Washington court fully protected its citizens' rights to the use of the beach area in question.

But that area subject to the public trust, or the public right of use, is not necessarily limited to the area of state ownership.[20] In nearly all of the recent cases on the point it has been held to be different. And it is the major thrust of this article to show that it is within the competence of a legislative

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[16] 126 Eng. Rep. 1351, 1394-95 (1801) (emphasis supplied).

[17] The approach with the greatest historical support holds that certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs. It is thought that, to protect those rights, it is necessary to be especially wary lest any particular individual or group acquire the power to control them. The historic public rights of fishery and navigation reflect this feeling . . .
Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 484 (1970).

[18] In Oregon it has been held not to. As one Oregon court has said: "While the foreshore is 'owned' by the State, and the upland is 'owned' by the patentee, or record title holder, neither can be said to 'own' the full bundle of rights normally connoted by the term 'estate in fee simple.'" State *ex rel.* Thornton v. Hay, 254 Ore. 584, ——, 462 P.2d 671, 675 (1969).

[19] 67 Wash. 2d 799, 410 P.2d 20 (1966). This case was ultimately reversed and remanded by the Supreme Court in United States v. Washington, 389 U.S. 290 (1967), but the reversal was not related to the vegetation line question, and the vegetation line demarcation used by the state court in *Hughes* is no without reason and precedent.
"Nevertheless, it seems probable that in terms of precedent and practical reliance on precedent, a better argument can be made for a vegetation line than for a mean high tide line as defined by *Borax*. *Borax* was novel in 1935. Since 1935 it has had surprisingly small influence.
"In 1947, the second decade following *Borax*, the *Manual of Surveying Instructions* published by the United States Department of the Interior, Bureau of Land Management, defined tidelands. Its most specific definition was provided by quotation from Justice Field's opinion in *San Francisco v. LeRoy* in 1891.
"The lands which passed to the State upon her admission to the Union were not those which were affected occasionally by the tide, but only those over which tidewater flowed so continuously as to prevent their use and occupation. To render lands tidelands, which the State by virtue of her sovereignty could claim, there must have been such continuity of the flow of tidewater over them, or such regularity of the flow within every twenty-four hours, as to render them unfit for cultivation, the growth of grasses or other uses to which upland is applied."
Corker, *supra* note 14, at 68.

[20] Peck v. Lockwood, 5 Conn. (Day) 22 (1811). See notes 26-40 *infra*.

body, either state or federal, to make provisions of law which militate in favor of treating the question of *public right to use the beaches* as separate and distinct from the question of *state ownership as opposed to littoral titleholder ownership.*

II. HOW COURTS HAVE MET THE PROBLEM

The United States Supreme Court in *Shively v. Bowlby*[21] described the public trust which attaches to "lands flowed by the tide" as follows:

"At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the Colonies, like rights passed to the grantees in the royal charters in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States.

"Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people and in trust for the several States to be ultimately created out of the Territory.

"The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions."[22]

Thus, land passed into the hands of individuals of other entities from that government which was the sovereign of the soil at the time of the grant.

Of course, not all lands which passed in this way were granted under the common law. For instance, in Texas, Alabama, California, and Florida there were grants made under Spanish and Mexican law and, in the case of Texas, under the law of the Republic of Texas. But the land which was the subject of these grants has been controlled by state land law throughout nearly all of the country for more than a century and a quarter. The manner of legal thinking, the attitudes toward ownership and common use, and the basic national concerns relating to access to the sea have had a high degree of commonality throughout the seaboard states.

As will be seen below the broad direction of the decisions on public access to the sea is the same in Texas, California, and Florida—states influenced by the Civil Law (Roman law as applied through Spanish and Mexican law)—as it is in states where the law is altogether derived from a common law base.

The Civil Law is favorable to such public access. Under the jurisprudence of Justinian,

"[B]y the law of nations the use of the shore is also public, and in the same manner as the sea itself, and for this reason any person is at liberty to place a cabin there, in which he may harbor himself, and for the like reason to dry nets and draw them from the sea. Likewise, any person exercising reason, may use the sea bed and the sand that washes up from it."[23]

It is clear that by the term *shore* the Civil Law meant both the foreshore and the dry sand beach, for it would hardly be practical at any time of the year to build any shelter calculated to be used more than half a day on the portion of the beach swept by the neap tides; and even to build it just below mean high tide would, as that term is defined in *Borax Consolidated v. Los Angeles*,[24] be an act of futility. Of course, the shelter referred to probably meant something like the temporary tents and impromptu accommodations made of driftwood, or the spreads and blankets that are seen on most open beaches today. The Latin word used is *casa*, which in the Latin of Caesar and Cicero meant "a cottage, cabin or hut of turf, straw, leaves, etc."[25]

States with geography and legal heritage as disparate as Texas and Oregon have found their situations respecting public access to the sea so similar as to adopt similar statutory law relating to the public right to beach access. And

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[21] Shively v. Bowlby, 152 U.S. 1 (1894).

[22] *Id.* at 57.

[23] "Littorum quoque usus publicus est et juris gentium, sicut et ipsius maris; et ob id cuilibet liberum est casam ibi ponere in quam se recipiat, sicut retia siccare, et ex mari deducere; Proprietas autem eorum potest intelligi nullius esse, sed ejusdem juris esse, cujus et mare, et quae subjacet mari terra vel arena." *Quoted by* Holroyd, J. in Blundell v. Catterall, 106 Eng. Rep. 1190 (K.B. 1821).

[24] 296 U.S. 10 (1935).

[25] *See* LEVERETT'S LATIN LEXICON (under "casa").

the similarity of fact situations in Texas, California, and Oregon are marked.[20] Let us now consider the legal theories upon which the state decisions are based.

A. Implied dedication to prescription

Both the Texas and California cases are primarily based upon the theory of implied dedication. However, as one commentator has said, "dedication without intent to do so signals the presence of something very much like a prescriptive easement."[21] The Supreme Court of California recently dealt with this issue in *Gion v. Santa Cruz*.[22] The decision in that case has been described in this way:

"The court held that common law dedication to the public can be proved either by a showing of acquiescence by the owner in the public use, or by establishing open and continuous use by the public for the prescriptive period, which in California is only five years. Thus adverse use of which the owner is aware will establish the dedication. The test of use is whether the public used the land as it would any other public land, going on it believing that the right to do so existed apart from anyone's permission."[23]

In *Seaway Co. v. Attorney General*, the Texas Civil Appeals Court said:

". . . [T]he thing of significance is that whoever wants to use [the beach] did so continuously for these many years when they wished to do so without asking permission and without protest from the landowners."[24]

The Texas court based its decision upon the theory that a prescriptive easement had been acquired, as well as upon the ground of implied dedication.

Thus, both the California and Texas courts are evolving the legal theory that a customary use by the public of the specific lands in question may crystallize into a *right* of public access to the beaches.

The same theory has been followed in Florida. In *Daytona Beach v. Tona-Rama, Inc.*,[25] the court held that the public's use of the disputed area "as a thoroughfare, for sunbathing, picnicking, frolicking, running of dune buggies, parking, and generally as a recreation area and playground" for more than twenty years established a prescriptive right to continue that use.

The implied dedication or prescription approach has been tried in Oregon in one aspect of attempted littoral land control in *State Highway Commission v. Bauman*.[26] In *Bauman* the state agency asserted that since the early 1900's the general public had used the sand dune area in question for various recreational purposes without limitation, openly and under claim of right, that permission from the owners had never been sought or obtained to so use it, and that the owners knew about the public use and had acquiesced in it. Upon the basis of this asserted public right of use, the state agency sought to enjoin the building of a condominium on the dunes landward of the vegetation line.

The *Bauman* court found that there was no clear and unequivocal manifestation of any owner's intention impliedly to dedicate this upland to the public. As to the question of prescriptive easement, the court said:

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[20] In the Texas case of Seaway Co. v. Attorney General, 375 S.W.2d 923, 936 (Tex. Civ. App. 1964), prior to and at the time of the grant of the littoral lands in question (on Galveston Island) the Republic of Texas had dedicated the beach for use by the public. The beach in question had continuously, and as a matter of practice, been used by the public as a public way and for use in connection with fishing, swimming and camping.

In California, as shown by Dietz v. King, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970), the public had used the beach and the road for at least 100 years. The nature of the use was typical. The public came in substantial numbers to camp, picnic, collect and cut driftwood for fuel, and fish for abalone, crabs and fin fish. Some camped on the beach for weeks at a time drying kelp and catching and drying abalone and fin fish.

In Oregon the situation was similar. In State *ex rel.* Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969) the court noted the unique nature of the lands in question, that they were the dry sand beach and could not be used conveniently by their owners for any other purpose but typical beach uses: that is "for picnics, gathering wood, building warming fires, and generally as headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede." The courts recognized that this land had been used by the public as public recreational land according to an unbroken custom running back in time as long as the land has been inhabited. *Id.* at ——, 462 P.2d at 673.

[21] 2 Envir. L. Rptr. ¶ 10184 (1972).

[22] Gion v. Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970).

[23] 2 Envir. L. Rptr. ¶ 10184 (1972).

[24] Seaway Co. v. Attorney General, 375 S.W.2d. 923, 936 (Tex. Civ. App. 1964).

[25] 271 So. 2d 765, 766 (Dist. Ct. App. Fla. 1972).

[26] 3 Envir. L. Rptr. ¶ 20290 (Ore. Cir. Ct., Feb. 23, 1973).

". . . In fact, in charitable summarization of all of plaintiff's evidence . . . about all that can be discerned is that some members of the public used the property 'many times' in a variety of ways. This simply does not establish the elements of a prescriptive easement

". . . It might be, however, that plaintiff has proven more clearly some limited right of public access through and across the subject property. However, as previously noted in the discussion of the theory of implied dedication, the defendants herein are already providing ample and improved access for the public through the property."[23]

This case, which is now on appeal, does not shake the Oregon theory of immemorial custom discussed in the following section of this article, because it does not relate to land *seaward* of the vegetation line. Also, it is distinguishable from the Texas, California, and Florida cases based on implied dedication and prescription for the same reason. A stricter rule respecting continuous and adverse public use may reasonably be applied to uplands that have not traditionally been impressed with rights related to access to the sea. This is particularly true where, as in *Bauman*, real access to the sea is not impaired.

B. Immemorial custom and public trust

The theories of immemorial custom and public trust are intertwined. Certain beach lands, for instance, are held by a state *in trust* for the people: but the basis of the state's holding (or of the people's right to the customary usage) is not title but *immemorial custom*. The Oregon Supreme Court has recognized immemorial custom as a basis for the right of public access to beach land, and the Oregon legislature has fleshed out the concept in its statute.[24]

The immemorial custom theory is best enunciated in *State ex rel. Thorton v. Hay*.[25] There, Oregon had brought suit against a motel owner who had enclosed a portion of the beach above high tide for the exclusive use of motel guests. Relying explicitly upon the *Seaway*[26] case, the lower state court found that a public right to use the dry sand beach existed by implied dedication.[27] The court reviewed the Oregon statute and found it to be virtually identical in all relevant respects to the Texas legislation upon which it was patterned. On appeal, the Oregon Supreme Court affirmed the decision upon the ground that the public's right to use the shore derived from immemorial custom.

Now let us consider the cases that rely at least in part upon the public trust theory. We shall not discuss the doctrine itself at length, but rather will confine our analysis to recent cases which bring the public trust theory into play in connection with beach access.[28]

In *Gewirtz v. Long Beach*,[29] the facts were these: The city of Long Beach, New York, which owned a beach area which formed its ocean front boundary, administered it as a public beach for a number of years. In 1971, it sought by local law to restrict the beach for use of city residents and their invited guests. A state court held that the city had, by its actions between 1937 and 1970 in dedicating the beach to use by the public at large, put itself in the

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[23] *Id.*

[24] It is the public policy of the state of Oregon to preserve its sovereignty over the ocean shore from the Columbia River on the north to the California border on the south "so that the public may have the free and uninterrupted use thereof." The public "has made frequent and uninterrupted use," says the statute, "of the ocean shore" and the Legislative Assembly recognizes "that where such use has been legally sufficient to create rights or easements in the public through dedication, prescription, grant or otherwise, that it is in the public interest to protect and preserve such public rights or easements, that it is in the public interest to protect and preserve such public rights or easements as a permanent part of Oregon's recreational resources." ORE. REV. STAT. § 390.610 (1971).

Elsewhere in the statutes Oregon specifically describes by metes and bounds the "ocean shore" which it generally defines as "the land lying extreme low tide of the Pacific Ocean and the line of vegetation . . ." Though the statute contains the proviso that the lands are subject to the statute where a "use has been legally sufficient to create rights or easements in the public through dedication, prescription, grant or otherwise," the *Hay* case held that the Oregon beaches back to the vegetation line are land of a unique nature, have been used by the public recreational land according to an unbroken custom running back in time as long as the land has been inhabited, and are therefore by ancient and accepted custom subject to the people's right to access to the sea and all traditional rights of recreation, etc. appertaining thereto.

[25] State *ex rel.* Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969).

[26] Seaway v. Attorney General, 375 S.W.2d. 923 (Tex. Civ. App. 1964).

[27] No. 27–102 (Ore. Cir. Ct.) [unreported but set out in full in appellant's brief on appeal, State *ex rel.* Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969)].

[28] The lodestar of the public trust theory is Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892). For a comprehensive consideration of the doctrine, see Sax, *supra* note 17.

[29] 69 Misc. 2d 763, 330 N.Y.S.2d 495 (Sup. Ct., Nassau Co. 1972).

position of holding the beach as parkland in public trust for the benefit of the public at large.

The *Gerwirtz* case does not give independent life to the public trust doctrine. It merely holds that after a beach has come into the hands of a public entity, such as a municipality, and the public entity has dedicated it to general public use, it holds the property in trust for that general public use and may not retract the dedication by excluding a part of the public (*e.g.*, persons not residents of the municipality).

A New Jersey case, *Neptune City v. Avon-by-the-Sea*,[40] carries the public trust doctrine much further. This decision protects a public trust traditionally impressed upon land bordering the sea and appears to assert authority to give it definition, geographically and functionally, to protect the public interest as presently determined by the court.

C. Common elements in the state cases

All the cases cited which address the question of public access to the dry sand beach have important elements in common:

"(1) The cases all culminate in protection of a public right.

"(2) They all rest upon a customary public use from time immemorial or over an expanse of time sufficient to ripen custom into a prescriptive right.

"(3) They all take into account the special character of the beach and the public interest therein."

Certain conclusions may be drawn from these cases and from their common elements:

"(1) There is legal basis for concluding that beaches are generally impressed with a public interest.

"(2) *Any* owner of beaches holds them in trust for the public insofar as the right of access to the sea is concerned—

"(a) unless the sovereign is shown to have expressly provided otherwise in the grant or by statutory provision, or

"(b) unless by other means it is shown that the customary usage of the beach clearly rebuts the proposition that they are impressed with a public interest."

III. A NATIONAL APPROACH: H.R. 4932

When such common elements are perceived the question naturally arises as to whether there should not be an attempt by federal legislation to bring some uniformity to (a) expressed public policy with respect to public right to access to the sea, and (b) the manner of establishing when and to what extent the land adjoining the sea is impressed with such public right.

The problem here involved is national in scope, and a national boost toward solving it is needed if beach lands now publicly available are not to dwindle faster than the state courts can stem the tide toward private, exclusive control. Because application of some kind of general law seems called for, the writer has attempted to distill from the cases some generally applicable propositions.

The first point has been made earlier in this discussion, but it is so fundamental that it bears repeating: (1) The people's right to access to the sea exists independently of the sovereign's ownership of lands "flowed by the tide."

The second point was firmly established many years ago, but it is frequently forgotten, and the people's right to access to the sea is confused with the question of the bounds of sovereign ownership. The point is—

"(2) The fact that a littoral title holder *owns* the land in question does not necessarily mean that a people's right of access does not exist."

"(3) A court may resolve the question of the existence and extent of the asserted immemorial usage in favor of the public right to continue it."

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[40] 61 N.J. 296, 294 A.2d 47 (1972).

[41] This point was recognized as early as Peck v. Lockwood, 5 Conn. (Day) 22 (1811). There the Connecticut Supreme Court of Errors said: "The flats, therefore, are the plaintiff's estate in fee, and the question is this, viz., has the defendant a right to enter thereon, for the purpose of taking 'claims'? . . . The usage stated in the case I make no use of, except that it furnishes evidence that our ancestors always supposed that they had a right to fish and take claims on such lands as these . . . . [The court then held for the defendant. The defendant had proved that] the inhabitants of the town of Greenwich, and other places, had without molestation, from the first settlement of the country, at proper seasons, entered upon such sedge flats and dug and carried away the shell fish, and had also removed so much of the sedge as was necessary for the purpose of taking such sell fish."

Modern authorities are cited in notes 26–40 *supra*.

Oregon has done this by recognizing first in the courts,[12] and then by statute,[13] that there is a public right to use of the beaches back to the vegetation line because of public usage thereof from time immemorial.

"(4) Even if the court does not find that customs supports the public right from time out of mind, it may find in any given case that continued use has ripened into an impliedly dedicated, or prescriptive, easement."

Such, as we have seen, is the theory of the Texas and California cases.[14] It is the initial basis of the right in the public to the whole beach in the New York case which says that once the dedication has occurred, the land is held by the township subject to the public trust.[15]

IV. FEDERAL LAW AS A STIMULUS TO PROTECTION OF PUBLIC RIGHT

But though these points are being clarified in the states referred to above, the right of access to the beaches under common law is clouded. States that have not litigated the matter may speak in general terms in their constitutions and statutes about public riparian rights but they do not squarely face the problem of the public's right of ingress and egress to the beach.[16] If the law were clarified through litigation, such could and in many areas would result in a holding that the public had retained its access to the beaches through a variety of legal theories, including dedication of the means of access to the public use, prescription, implied reservation of access by the state when it initially granted or sold land to private individuals, immemorial custom, and a trust on behalf of the public.

The purpose of a federal law should be to facilitate the process, and, I believe, passage of a bill like H.R. 4932 would do so.

Establishment of public policy by statute gave a boost to court action to protect beaches for public use in both Texas and Oregon. The proposed federal act provides, in even stronger language than in those states, that Congress is exercising its full constitutional power to guarantee to the public free and unrestricted right to use beaches as a common, consistent with property rights of the littoral landowners.

Section 205 of H.R. 4932 sets out evidentiary rules to facilitate litigation of questions of ownership and right of access by the public. If the area is shown to be a beach, the plaintiff will have made a prima facie case that the title of the littoral landowner does not include the right to prevent the public from using

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[12] State *ex rel.* Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969).

The Oregon Supreme Court followed *Thornton* in the later case of State Highway Comm'n v. Fultz, —— Ore. ——, 491 P.2d 1171 (1971), analyzing *Thornton* as follows: "The court [in *Thornton*] discussed the rights of the public based on the theories of prescription and implied dedication, but concluded that 'the better legal basis' supporting the rights of the public to an easement for recreational use was the English doctrine of customs. Applying that doctrine, the court held that 'ocean front lands from the northern to the Southern border of the state ought to be treated uniformly.' " 491 P.2d a 1172.

In Hay v. Bruno, 344 F. Supp. 286 (D. Ore. 1972), a federal court cast doubt upon the reasoning used by the Oregon court in the *Thornton* case. The *Hay* court stated that, "on a claim of federal right, this court is not bound by the reasoning of the State Court even when the Court is construing its own statute." 344 F. Supp. at 289. In *Hay*, however, the federal court went on to uphold unreservedly the *Thornton* result, saying: "There was no unpredictable result here. The action of the Supreme Court of Oregon was consistent with and is supported by a number of decisions from other jurisdictions which confirm the right of a State under similar circumstances to protect and preserve its beaches for the benefit of the people."

Id. See Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

[13] ORE. REV. STAT. § 390.610 *et seq.* (1971).

[14] Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App. 1964); Glon v. Santa Cruz and Dietz v. King, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970).

[15] Gewirtz v. Long Beach, 69 Misc. 2d 763, 330 N.Y.S.2d 492 (Sup. Ct., Nassau Co. 1972).

[16] For instance, Alabama speaks in its constitution in terms of "all navigable waters" remaining "forever public highways, free to the citizens of the State and the United States," and provides that no burden shall be put on the "use of the shores. . . ." ALA CONST. art. I, § 24.

"Shore" has been defined by case law in Alabama as the: . . . land on the margin of the sea or lake or river; that space of land which is alternately covered and left dry by the rising and falling of the tide; the space between high and low water marks. And it is said that such is synonymous with beach."

Mobile Dry Dock Co. v. City of Mobile, 146 Ala. 198, 40 So. 205 (1906). But there is neither statutory authority nor case law to settle the important question of the people's access to the sea in Alabama.

the beaches and that the public has acquired a prescriptive right to use the beach as a common.

These are the salient substantive provisions in the bill. If enacted, it would not interfere with the law of Oregon (that beach rights extend back to the vegetation line by virtue of immemorial custom),[47] of Texas (that, under its statute, a presumption exists in favor of no right to exclude the public in an area back to the vegetation line),[48] of California and Florida (that the public right of beach use may extend back to the vegetation line if implied dedication is shown),[49] of New York (that prescription plus public trust concepts may protect the area for public use),[50] and of New Jersey (that such area is available to the public under the theory that it is within the public trust duty of any governmental body exercising control of it).[51]

The law of the State of Washington affords a good example of the need for federal legislation to provide (1) a national policy respecting the public right of access to the sea and (2) a recognition that the sovereign may protect a public trust (respecting use) that goes beyond the traditional reach of sovereign ownership.

In the case of *State v. Hughes*,[52] it was held, *inter alia*, that state ownership of the beach went back to the vegetation line. In addition, that case held that accretions would redound to the benefit of the state instead of to the littoral owner and that this question was subject to state law. Speaking to this latter point, the United States Supreme Court reversed the state court in *Hughes v. Washington*,[53] holding that the law respecting accretions in the case of property held under a grant from the United States was federal law, not state law. Upon remand, defendant's title (to the point of high tide) was affirmed. However, the state of Washington, noting that the High Court in its decision did not address the subject of the state's determination that the "ordinary high tide" line is the vegetation line, has continued since *Hughes* to assert its title to the vegetation line. Its position on this point has not been disputed by a littoral owner since the *Hughes* case. *Gorton v. Hill* and *Gorton v. Burrell*[54] were cases brought by the State Attorney General in the Superior Court for Pacific County to enjoin bulldozing of primary dunes on the Pacific ocean front. A temporary injunction was issued in *Hill* on January 25, 1971, and, in *Burrell*, on November 5, 1971. Though the bulldozing was actually landward of the vegetation line, the state took the position that an injunction was necessary because destruction of the primary dune threatened (1) the people's right to use of the beach, and (2) the state's title by destroying its line of demarcation at the vegetation line. The preliminary injunctions still stand, and there is apparently no further contest of them or of the state's contention. Thus, the state of Washington joins the state of Oregon in determining that it is entitled to protect the people's use of the beach back to the vegetation line.

V. CONCLUSION

This series of cases illustrates a very practical and immediate need for establishing federal policy with respect to the right of use of the beach. Justice Black, in *Hughes v. Washington*,[55] determined that questions of title emanating from the United States before Washington became a state are questions of federal law. *Borax Consolidated v. Los Angeles*[56] held that, in a case subject to the federal common law, the state owns the shore back to the point of mean high tide. No United States Supreme Court case has addressed the question of whether or not, or to what extent, the dry sand beach may be subject to the public right of access to the sea, a question which, as we have seen, is a *dif-*

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[47] State *ex rel.* Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969).
[48] TEX. STAT. ANN. § 5415(d) (Vernon Supp. 1972).
[49] Glon v. Santa Cruz and Dietz v. King, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970); Daytona Beach v. Tona-Rama, Inc., 271 So. 2d 765 (Dist. Ct. App. Fla. 1972).
[50] Gewirtz v. Long Beach, 69 Misc. 2d 763, 330 N.Y.S.2d 495 (Sup. Ct., Nassau Co. 1972).
[51] Neptune City v. Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972).
[52] 67 Wash. 2d 799, 410 P.2d 20 (1966), *rev'd on other grounds sub nom.* Hughes v. Washington, 389 U.S. 290 (1967).
[53] 389 U.S. 290 (1967).
[54] Nos. 16,589 and 16,885, respectively, in the Superior Court for Pacific County, Washington.
[55] 389 U.S. 290 (1967).
[56] 296 U.S. 10 (1935).

ferent question than that of ownership.[87] Congress should speak on this question. The passage of H.R. 4932 would clarify federal public policy and would show federal recognition of a difference between *ownership* and the *right to public use*; and it would put the federal government on the same side as the state, at least to the extent of recognizing a prima facie public right of access to the sea in the area seaward of the vegetation line.[88]

The question of what is included in a United States grant is one of federal law. It is most desirable that federal law be as harmonious as possible with the law of the ocean-front states like Washington. As we have seen, all of the states that have entered the field of litigation of the right of the public to access to the sea have, understandably and properly, entered on the side of the public. It would be most salubrious if an opportunity were given, as is done in H.R. 4932, for the attorneys general of the states and of the United States to act together in seeking to achieve a common goal. The act would only accelerate the process of utilizing state theories for protection of their public beaches by declaring federal policy in their favor, by establishing favorable prima facie presumptions, and by bringing to the aid of the states all federal legal and technical expertise to establish the public right to use of ocean-front lands back to the vegetation line.[89]

H.R. 4932, as has been shown, does not prescribe the exact manner in which states must protect the public right to use of the beaches; but, if they take all steps which they reasonably can to protect such rights, they are eligible to receive matching funds for the purchase of beaches which still can be saved for the public.[90] All beach lands acquired by law or by condemnation pursuant to H.R. 4932 would be fully under state control.[91]

It is submitted that such legislation would be the foundation stone for a rational national policy on public use of the nation's beaches.

APPENDIX

The following are pertinent portions of Congressman Eckhardt's open beaches bill, H.R. 4932, which has been introduced in the 93d Congress and is awaiting legislative action.

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[87] The *Borax* case not only did not deal with this question, but the question it *did* deal with, ownership, was resolved in a manner which, under the facts of the case, embraced *all* of the land back to the vegetation line within the area from low tide to mean high tide as that area was defined in the case. Indeed, the Borax Company argued that the evidence placed the vegetation line seaward of the mean high tide line. This may explain the otherwise inexplicable statement of the Court that the proper line "is the boundary between tillable land or land available for agricultural purposes and land so frequently covered by the sea that it is useless for agricultural purposes." Such statement would appear to militate in favor of the use of a vegetation line. Further, it should be noted that the court had before it in the Record in the Supreme Court, pp. 333–36, the testimony of David E. Hughes, an engineering witness called by the City of Los Angeles that supports use of the vegetation line as that heavily relied on for determining high water mark in engineering practice. *See* Corker, *supra* note 14, at 59 n. 89.

[88] H.R. 4932, 93d Cong., 1st Sess. § 204 (1973) provides that the federal district courts shall have jurisdiction to (1) establish and protect the public's right to the beaches, (2) determine the existing status of title, ownership and control, and (3) condemn such easements as is necessary to provide access to the beaches.

[89] H.R. 4932, 93d Cong., 1st Sess. § 208 (1973) provides: "The Secretary shall place at the disposal of the States such research facilities as may be reasonably available from the Federal Government, and, in cooperation with the other Federal agencies, such other information and facilities as may be reasonably available for assisting the States in carrying out the purposes of this title. The President may promulgate regulations governing the work of such interagency cooperation."

[90] H.R. 4932, 93d Cong., 1st Sess. § 209 (1973) provides: "The Secretary is authorized to make grants to States for carrying out the purposes of this title. Such a grant shall not exceed 75 per centum of the cost of planning, acquisition, or development of projects designed to secure the right of the public to beaches where the State has complied with this title and where adequate State laws are established, in the judgment of the Secretary, to protect the public's right in the beaches."

[91] H.R. 4932, 93d Cong., 1st Sess. § 206 (1973) provides: "(a) Nothing in this title shall be held to impair, interfere, or prevent the State's—

"(1) ownership of its lands and domains,

"(2) control of the public beaches in behalf of the public for the protection of the common usage or incidental to the enjoyment thereof, or

"(3) authority to perform State public services, including enactment of reasonable zones for wildlife, marine, and estuarine protection.

"(b) All interests in land recovered under authority of this title shall be treated as subject to the ownership, control, and authority of the State in the same measure as if the State itself had acted to recover such interest. In order that such interest be recovered through condemnation, the State must participate in acquiring such interest by providing matching funds of not less than 25 per centum of the value of the land condemned."

"SEC. 202. By reason of their traditional use as a thoroughfare and haven for fishermen and sea ventures, the necessity for them to be free and open in connection with shipping, navigation, salvage, and rescue operations, as well as recoreation. Congress declares and affirms that the beaches of the United States are impressed with a national interest and that the public shall have free and unrestricted right to use them as a common to the full extent that such public right may be extended consistent with such property rights of littoral landowners as may be protected absolutely by the Constitution. It is the declared intention of Congress to exercise the full reach of its constitutional power over the subject.

"SEC. 203. No person shall create, erect, maintain, or construct any obstruction, barrier, or restraint of any nature which interferes with the free and unrestricted right of the public, individually and collectively, to enter, leave, cross, or use as a common the public beaches.

"SEC. 204. (a) An action shall be cognizable in the district courts of the United States without reference to jurisdictional amount, at the instance of the Attorney General or a United States district attorney to—

"(1) establish and protect the public right to beaches,

"(2) determine the existing status of title, ownership, and control, and

"(3) condemn such easements as may reasonably be necessary to accomplish the purposes of this title.

"(b) Actions brought under the authority of this section may be for injunctive, declaratory, or other suitable relief.

"SEC. 205. The following rules applicable to considering the evidence shall be applicable in all cases brought under section 204 of this title:

"(1) a showing that the area is a beach shall be prima facie evidence that the title of the littoral owner does not include the right to prevent the public from using the area as a common;

"(2) a showing that the area is a beach shall be prima facie evidence that there has been imposed upon the beach a prescriptive right to use it as a common.

SEC. 206. (a) Nothing in this title shall be held to impair, interfere, or prevent the State's—

"(1) ownership of its lands and domains,

"(2) control of the public beaches in behalf of the public for the protection of the common usage or incidental to the enjoyment thereof, or

"(3) authority to perform State public services, including enactment of reasonable zones for wildlife, marine, and estuarine protection.

"(b) All interests in land recovered under authority of this title shall be treated as subject to the ownership, control, and authority of the State in the same measure as if the State itself had acted to recover such interest. In order that such interest be recovered through condemnation, the State must participate in acquiring such interest by providing matching funds of not less than 25 per centum of the value of the land condemned.

"SEC. 207. In order further to carry out the purposes of this title, it is desirable that the States and the Federal Government act in a joint partnership to protect the rights and interests of the people in the use of the beaches. The Secretary shall administer the terms and provisions of this title and shall determine what actions shall be brought under section 204 hereof.

"SEC. 208. The Secretary shall place at the disposal of the States such research facilities as may be reasonably available from the Federal Government, and, in cooperation with the other Federal agencies, such other information and facilities as may be reasonably available for assisting the States in carrying out the purposes of this title. The President may promulgate regulations governing the work of such interagency cooperation.

"SEC. 209. The Secretary is authorized to make grants to States for carrying out the purposes of this title. Such a grant shall not exceed 75 per centum of the cost of planning, acquisition, or development of projects designed to secure the right of the public to beaches where the State has complied with this title and where adequate State laws are established, in the judgment of the Secretary, to protect the public's right in the beaches.

"SEC. 210. The Secretary is authorized to provide financial assistance to any State, and to its political subdivisions for the development and maintenance of transportation facilities necessary in connection with the use of public beaches in such State if, in the judgment of the Secretary, such State has defined and sufficiently protected public beaches within its boundaries by

State law. Such financial assistance shall be for projects which shall include, but not be limited to, construction of necessary highways and roads to give access to the shoreline area, the construction of parking lots and adjacent park areas, as well as related transportation facilities. All sums appropriated to carry out title 23 of the United States Code are authorized to be made available to carry out this section."

Mr. ECKHARDT. Mr. Brock Evans of the Sierra Club, Washington representative.

STATEMENT OF BROCK EVANS, WASHINGTON REPRESENTATIVE FOR THE SIERRA CLUB AND THE FEDERATION OF WESTERN OUTDOOR CLUBS

Mr. EVANS. Thank you, Mr. Chairman.

My name is Brock Evans. I am the director of the Washington office of the Sierra Club and I am also the representative of the Federation of Western Outdoor Clubs. Both organizations, as you know, have a long history of active work to protect our natural heritage. We certainly think that a vital part of this is in the seashore and we think it is the citizens' right to have permanent access to the sea and common use of the beaches and for that reason we strongly support the legislation before us now and its policies.

Broadly outlined, this is especially true of the east coast where the presence of the population is increasing as in the D.C. area now, and more so in more and more of this country's coastlines are being walled off by developers and that we need some kind of policy as we have in this bill to change this.

We strongly feel some parts of earth natural heritage and resources should be enjoyed in common and should not belong to the favored few and beaches are certainly very much one of them.

I have been sitting here for awhile. I did not get to hear all of the testimony this morning but I have to state, Mr. Chairman, I strongly disagree with what appears to be the basic thrust of the representative of the Department of Commerce. I think that the act before us is quite different from the Coastal Zone Management Act. This act declares a very important principle that the beaches are a common resource and the public has an unrestrictive right to use it and this means all beaches, as I see it, not just whichever specific ones the Federal Government and the States after years of pulling and hauling decide are politically feasible between the Coastal Zone Management Act which we certainly support and have supported and this legislation here.

I have residence in the State of Washington. That is where I have been for the last decade or so, and I claim it as my home. You may be familiar with the country up there. There is a place called San Juan Islands, with 172 islands up in Puget Sound—a very beautiful place with about 2,000 miles of coastline on Puget Sound and about 95 to 98 percent privately owned and I have been up there boating with my friends a number of times and we have wanted to land on the beaches. We stopped there and fished or picnicked when nobody is around, but you know you cannot stay because much of the beach belongs to someone or someone will come and try to run you off.

We feel that this imposes on those who are not property owners. We want to have the proper respect for the private owners but I

fail to see how stopping on the beaches is going to affect them, and that is why I think this legislation is so important.

There has been some reference made to the State of Washington Shorelines Act. I was the field representative for our organizations based in Seattle, and I participated a little in the drafting of that act and getting it through. I think it is important to note for the record that the act that they now have is a compromise bill—a compromise to the developers and to the best of my recollection now, a few years later, it says nothing whatsoever about real access of the beaches that we are talking about in this legislation. So, I totally disagree that that does anything near the same job that this one does. I think they are complementary and we commend you for it.

We did not get a chance to hear the gentleman from Oregon this morning but I did look at his testimony and I have to say, again, we disagree with some of the points made that somehow this legislation is an unconstitutional exercise of Federal power. I think that there is far more than a tenuous relationship to the interstate commerce clause. Beaches are used by everybody. I grew up in Ohio and my family used to travel to Massachusetts, to Cape Cod where we could use the beaches there and the people here as you know use the Virginia beaches. That is very important. We are landlocked. People in Idaho should be able to use the Washington beaches and also when there you see many license plates from other States.

I think beaches are most truly and in a most complete sense a national resource and certainly ought to have the protection of the Federal authority.

We also disagree section 205 appears to be unconstitutional. This is shifting the burden of proof, if it is a shifting, and it is perfectly logical and proper in the case of a resource such as a beach which attracts people from so far away and which has been used for many, many generations by everybody as a common resource.

So, to sum up without going on too much, Mr. Chairman, I think this is a fine piece of legislation and we want to offer our support in every way possible.

Mr. ECKHARDT. Thank you for your testimony. Your remarks concerning the taking of beaches in the State of Washington for private and exclusive use is a very interesting one.

I noted the same thing in Florida. For instance, where hotels are built and properties are right on the sea, and they put in barriers and swimming pools instead of the sandy beach, and raise the ground and put in at the end of such beaches things like a sea wall. these things have ordinarily been said to have been done because of some ownership of that land but in many instances it was simply an expropriation of the land by private industry, and I think this is frequently not fully understood. This is what the bill really addresses itself to.

In researching this matter there were two things that came to my attention. One was the ancient law of England, which referred to—

But though the King is the owner of this great waste.

Speaking of the sea—

And in consequence of his property hath the primary right of fishing in the sea, and the creeks, and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea, or creeks, or arms thereof, as

a public common * * * and may not without injury to their right be restrained of it, unless in such places, creeks or navigable rivers, where either the King or some particular subject hath gained a proprietary exclusive of that common liberty.

Now, you will note in there that the King as the sovereign is distinguished from the people's right, and I think this has not been recognized with respect to the use of land adjoining the sea, in the instances like you described in Washington, and in the instances I described in Florida.

The sovereign in some instances has title to a beach, in which case the sovereign may control it, but when we are addressing not the sovereign title, but a peoples' right, the right arises from common law concept and, as I understand it, that is about what the Oregon Court was saying in the *Hay* case, it was relying on the ancient custom right that was recognized in the people of Oregon.

It is rather interesting that an almost exact parallel attitude arises out of the civil law and, of course, Oregon land, and the lands of New England have been affected most by the English common law.

The lands of Texas and Florida, and some other States, are affected by the civil law, but under the jurisprudence of Justine, it was said that—

By law of nations the use of the shore is also public, and in the same manner as it sees itself, and for this reason any person is at liberty to place a cabin there, in which he may harbor himself, and for the like reason to dry nets, and draw them from the sea.

Likewise, any person exercising reason may use the seabed and sand that washes up from it.

Now, that cannot be just in the area that is generally called the aforeshore, between low and high tides. This must mean something more than that. It must mean back to the dunes, because no one would be so stupid as to place a cabin in the place that would be inundated perhaps twice a day by the flowing tide.

Mr. EVANS. That is very interesting.

Mr. ECKHARDT. So I am simply suggesting that the present developing exclusive uses of land by the littoral owner is certainly by no means an accepted right which exists in many instances, and I think that is what we are discussing in this bill.

Mr. EVANS. I think this ties in with the other thing, too, when we go to solve the question of land use.

I think you can go to the Magna Charta and find there is no absolute unhindered right to do whatever you want on what we call private property. It has certain rights attached to it, but there are certain public responsibilities, too.

Mr. ECKHARDT. We certainly thank you for your testimony.

Mr. EVANS. Thank you.

Mr. ECKHARDT. If there are other witnesses here who are scheduled tomorrow from whom it would be more convenient to testify at this time, would you please identify yourself?

There being none, the hearing will be adjourned until tomorrow at 10 o'clock.

[Whereupon, at 2:55 p.m., the subcommittee recessed, to reconvene at 10 a.m., Friday, October 26, 1973.]

OPEN BEACHES

FRIDAY, OCTOBER 26, 1973

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON FISHERIES AND
WILDLIFE CONSERVATION AND THE ENVIRONMENT
OF THE COMMITTEE ON MERCHANT MARINE AND FISHERIES,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m. in room 1334, in Longworth Building, Hon. Bob Eckhardt presiding.

Mr. ECKHARDT. The subcommittee will be in order.

Our first witness is Hon. Walter Kiechel, Jr., Deputy Assistant Attorney General, Land and Natural Resources Division. We are glad to have your, sir.

STATEMENT OF HON. WALTER KIECHEL, JR., DEPUTY ASSISTANT GENERAL, LAND AND NATURAL RESOURCES DIVISION; ACCOMPANIED BY FLOYD FRANCE, CHIEF, GENERAL LITIGATION SECTION, LAND AND NATURAL RESOURCES DIVISION; AND BRUCE C. RASHKOW, CHIEF, MARINE RESOURCES SECTION, LAND AND NATURAL RESOURCES DIVISION; DEPARTMENT OF JUSTICE

Mr. KIECHEL. Thank you. I am accompanied here by two other representatives of the Land and Natural Resources Division, Department of Justice.

On my right is Mr. Floyd France, Chief of our General Litigation Section. On my left is Mr. Bruce Rashkow, Chief of our Marine Resources Section.

The Department is pleased to respond to the request of this committee for testimony on the bill H.R. 10394—

To amend the Act of August 3, 1968, relating to the nation's estuaries and their natural resources, to establish a national policy with respect to the nation's beach resources.

The Department has rendered a full report on this bill. That report also covers the nearly identical bill H.R. 4932. If there is no objection, perhaps the report could be inserted in the record at this point.

Mr. ECKHARDT. Without objection, it will be accepted into the record.

[Document referred to may be found on p. 9.]

Mr. KIECHEL. We do not have a formal statement. I would like to summarize the Department's report, and we will be glad to answer any questions.

The Department recommends against the enactment of this legislation. We cannot agree, as a matter of law, that the public is entitled to the free and unrestricted right to use beaches of the United States as a common.

In the United States, only the lands between high and low water lines normally belong to the States, and lands above the mean high water line belong to littoral owners. Indeed, Maine and Massachusetts apparently have relinquished title to littoral owners down to the low water line. Littoral land is generally not open to the public except where it has been made so by the littoral owners, be they the United States, a State or local government, or a private owner. Generally, it may be enclosed by the littoral owners down to the mean high water line, or lower as in Maine and Massachusetts, even where there has been substantial public use.

In our view, expanding the right of the public to use of beaches as defined in section 201 could be accomplished only by acquisition of the private property rights involved, by purchase, condemnation, or otherwise. The costs would be astronomical.

We also question the constitutional basis for suits by the United States to quiet the title of States or the interests of the public in beach property. It is one thing for the United States to bring suit to condemn land for a Federal purpose, as for a National Seashore. But any rights of a State or of the public to beach land normally would have been acquired by or under State law, and it is doubtful that suits by the United States to assert such rights would constitute such a case or controversy as is essential for Federal court jurisdiction under article III of the Constitution.

The Department finds numerous other serious problems with the bills H.R. 10394 and H.R. 4932, all of which we make quite plain in our report. For the reasons I have outlined and the additional reasons set out in the report, the Department recommends against enactment of this legislation.

If you have any questions, we will try to answer them.

Mr. ECKHARDT. Mr. Kiechel, I think you referred to section 201 as granting some manner of right. Section 201 is just a definition section for the Act. I am not sure whether you are really intending to refer to section 205 or not.

Mr. KIECHEL. The reference to section 201 was to the definition of beach in 201. Mr. Chairman. The thrust of my statement was that the right of public access or the right of the public to use beaches under Federal law we believe would have to be done by condemnation or purchase or some other means by which just compensation could be paid to the owner.

Mr. ECKHARDT. How do you then account for the decisions of the *Seaway* case in Texas concerning Galveston Island. There were the cases in Oregon and the city of Daytona Beach which touch on the question as well as the city of Los Angeles beach case and others as I recall. In all of these cases, though, the question of title was clearly settled to be in the littoral owner, nevertheless the right of use was established and protected in all those cases. I think that is common use. That is what we are really dealing with. The real question that we are concerned about in this bill is not who owns the

beach, but whether or not there has been impressed upon the beach a right of public use.

Mr. KIECHEL. I do not have intimate familiarity with these State decisions, Mr. Chairman. I have no reason to doubt that under State law that prescriptive right has been established, but I think the importance is that it is under State law, and the States have a much better handle, if you want to use that expression, on this matter by virtue of their ownership and jurisdiction over the tidelands.

Mr. ECKHARDT. That may be. I understood the question that you were addressing was some question about whether or not it was constitutional to do other than establish public right by the purchase of it. I am simply suggesting that there is another way to protect the public right and that is to establish that in fact the public right exists without its having been purchased.

Mr. KIECHEL. If that can be done under State law, then Federal law is unnecessary, that is the proposition to which I am speaking, sir. We see no basis for a Federal law with a declaration of this kind of a public right or right in common for access to the beach.

Mr. ECKHARDT. What impediment do you find to it as a Federal proposition?

Mr. KIECHEL. Well, sir, it is a basic proposition that there are private ownership rights involved in this access, and so far as I know the only acquisition of private rights that can be accomplished under Federal law is by purchase or condemnation or donation of those rights.

Mr. ECKHARDT. Section 204 provides that—

> An action shall be cognizable in the district courts of the United States to establish and protect the public right to beaches; determine the existing status of titles, ownership and control; and condemn such easements as may reasonably be necessary to accomplish the purposes of this title.

Of course you have no question, I assume, that we would have the right or the power, authority, if we should determine it to be a proper exercise of our power and authority in the Congress to provide for such condemnation.

You have no doubt about that, do you?

Mr. KIECHEL. It certainly would seem to be that that is a public use which would be involved, and the Congress could provide for the exercise of the power of eminent domain by the Federal Government to acquire those rights.

Mr. ECKHARDT. If they have that power, why do we not have the power also to establish what needs to be condemned, that is what we already own, or at least the public owns and may use. Obviously we would not want to condemn that if we are trying to protect public access. We would not want to pay for that which the public already has the right to use, do you agree with that?

Mr. KIECHEL. It is with that proposition that we have a problem—whether or not as a matter of Federal law the public has that right would not be involved, since any right would be derived under State law.

Mr. ECKHARDT. Suppose the question is determined as a matter of State law, is that not a proper subject matter for a Federal court's action under Federal law as ancillary to the determination of what should be condemned?

Mr. KIECHEL. Our difficulty with that section to which you refer, Mr. Chairman, is two-fold. One, we would be suing on behalf of a State for the acquisition or declaration of certain rights. As I said in my summary, we doubt that that would give the kind of a justiciable issue which would constitute a case or controversy required by article III of the Federal Constitution. Passing that point we would be doing something there which seems to me is rightfully the function of the State. I do not understand, first of all, how it would work procedurally, but from the point of view of the legal proposition, we would be, in effect, suing on behalf of the State.

Mr. ECKHARDT. Let's take this purely constitutional question. Of course I understand that reasonable men may disagree as to whether or not the Federal Government or the State is the primary protector of the beach. But let's look at it purely from the standpoint of whether this is a justiciable interest for the Supreme Court and whether it is within the power of Congress to act on it. Let us take an example.

Suppose before the *Seaway* case in Texas, which was the case dealing with Galveston beach, suppose at that time—and these facts did actually occur immediately after the *Luttes* case—the *Luttes* case, of course, determined that State ownership of the beach went back to the point of mean higher high tide in Texas. In other States it would be under common law, mean high tide, it is a little refinement with respect to those grants that occurred under Spanish and Mexican grants. After the *Luttes* decision people began building fences down to the water and thus preventing persons from going up and down Galveston beach. Suppose that about that time there had been a determination to protect that right by condemnation and purchase. It would seem to me to be extremely unwise to purchase the beach without first determining whether or not the public had the right to it without purchase. I think you would certainly agree with me that the States might properly pass an act, as they did in Texas, very similar to this act, and determine, first, whether the public had the right to the use of Galveston beach.

That is what Texas did.

A suit was then brought, the *Seaway* case, and it was determined that there was both unimplied dedication to the public and a prescriptive right on the part of the public to use the beach, and then of course the State did not condemn. They might well have condemned otherwise. It would certainly have been strong public pressure to protect a well known seashore area that the public thought they had a right to.

Let us suppose that the Federal Government decided to do this. Clearly the Federal Government can have decided to make a park of it and condemn it, could we not, ancillary to determining whether the condemnations were necessary, could we not have done at a Federal level precisely what we seek to do here in this act in order to determine whether the condemnation was prudent and justified or necessary?

Mr. KIECHEL. I would suppose that we would have to start from the proposition that there is a right under Federal law which would have given that prescriptive right to the Federal Government—to

the public as a whole as a matter of Federal law. I know of no law to that effect, Mr. Chairman. I am not saying what has been done in the past is the only answer, but I would call your attention to the fact that the Federal Government has undertaken to acquire a number of seashore areas, at Padre Island in your State of Texas, Assateague Island here in Maryland and Virginia, and at Cape Cod, and in each of those cases the Government has proceeded by either direct purchase or condemnation of the littoral ownership.

Mr. ECKHARDT. Well if they have the right, the unquestionable right of condemnation, and if we have the duty, assuming we have the right to condemn, to determine prudently whether or not condemnation could be exercised, and you admit these facts to be true, I mean we can condemn, can we not, that is Federal power that can be exercised by the statute?

Mr. KIECHEL. Certainly Congress can declare that such power be used for a public use—that can be done.

Mr. ECKHARDT. If that is a legitimate Federal authority, then why can we not, by statute, tell the Federal agency that it may go into court and determine whether or not under State law or under whatever law the public may or may not use the property—it seems to me ancillary to condemnation. It becomes absolutely necessary if prudent use of Federal funds are to be had to determine whether or not condemnation is necessary in the first place.

Mr. KIECHEL. I am not arguing against the course of action that has been taken by the State of Texas and other States. In fact, I applaud it. I think that this is an exercise of the State's authority which is certainly in the public interest, and the Federal Government and the States have, as a common objective, the protection of beach areas.

This is a part of the Federal program, which is manifested in the acquisition of seashore areas. But I am saying, sir, that when this bill provides that the Federal Government proceed, it is lacking in Federal basis. When it declares that the Federal Government shall proceed on behalf of a State right, then we get into this "justiciable issue" question.

Mr. ECKHARDT. I assume you are raising a question or intention that the authority here is not within the ambit of article III, section 2, of the Constitution?

Mr. KIECHEL. Which requires a case of controversy.

Mr. ECKHARDT. Of course I think I have already suggested to you that there is a Federal concern with respect to condemnation with respect to parks. It would seem to me that there is a Federal concern with respect to determining whether or not condemnation is necessary in the first place. Let me approach it another way. Suppose as we do here, we establish and recognize a public interest in the beaches, and we establish as we do here in section 205 certain prima facie determinations with respect to the question of prescription and with respect to the reach of the grant. Of course we do those two things here. We recognize Federal interest. We place the entire question within the ambit of Federal concern.

Then we call upon the court to consider questions under these standards and with these paramount concerns in mind in the adjudi-

cation of the case. Would you not say that the determination, whether it relies or is predicated on State law or not, is it at least within the penumbra of Federal statutory authority?

Mr. KIECHEL. Well I have a hard time making that concession or agreement, Mr. Chairman, because it seems to me that it is essentially still a matter of State law.

What you are saying here by this bill and your description of it is that we will have Federal court jurisdiction to determine this matter of State law.

Mr. ECKHARDT. Do you recall the *Westinghouse* case in which Justice Frankfurter was dealing with section 301 of the Labor Act?

Mr. KIECHEL. I do not have that in my memory.

Mr. ECKHARDT. That was a case in which, you know of course, the National Labor Relations Act assigns to Federal courts authority to bring actions or specific enforcement of an agreement to arbitrate under the labor contract.

In the *Westinghouse* case Justic Frankfurter wrote the majority opinion, and his position I think was very much like yours here, that the matter did not present a case in controversy under article III, section 2, because it was an attempt to assign to a Federal court the determination of contract law which was essentially a question of State law.

He urged, just as you are arging here, that there was an attempt to assign to the Federal court a determination of essentially a State question. And his decision was the majority opinion. Justice Reed dissented, saying that this was generally a matter of Federal concern with respect to control and the interest in labor agreements being added into, admittng of course that the contracts would have to be construed in accordance with precedent barred from State law.

Ultimately Reed's dissent became the majority position in *Lincoln Mills*. It would seem to me that there is no real distinction here between *Lincoln Mills* and this case. In both cases Federal concern is shown in the statute itself. In both cases precedent and authority is barred from State law, is that not a rather exact analogy?

Mr. KIECHEL. Well, sir, the extent of Federal jurisdiction under the commerce power, which I take it was the trrning point on the jurisdiction of regulatory authority of the Labor Board, I do not think is determinative of this matter. Here we start from the proposition that the Federal Government has no ownership of the tidelands. This is a basic proposition of property law as well as intergovernmental relationship between the States and the Federal Government.

The right of the sovereign under the common law to the area between the high and low water marks was passed to the States under our Government, so that the States have or had this title and in some cases still retain it. In certain instances they have even permitted private ownership down to the low water mark.

But they have a basis, not only in ownership but in sovereignty, to make the kind of determinations or declarations that you are talking about here of the right to public access to those areas. It seems to me that is lacking on the part of the Federal Government.

I am certainly not here to minimize the role of the Federal Government with respect to seashore areas or with respect to the public

access to beaches. Those are objectives we all share and support. But it seems to me that the partnership arrangement that this bill contemplates is better carried out from a legal point of view by having the States do as you say you have done in the State of Texas, and having the Federal Government proceed in its way in the acquisition of those areas which are deemed by the Congress to be necessary for acquisitions as Federal areas.

Mr. ECKHARDT. Do I understand that you say because the question of title is essentially a State question, that the Federal Government has no power under the commerce clause to enact legislation favorable or recognizing public use?

Mr. KIECHEL. No, sir. I am not arguing against the Federal Government's use of the commerce power. The ownership and the sovereignty of the States to the tidelands is subject to that plenary power, as it is called. I am a strong supporter, and advocate of the commerce power.

Mr. ECKHARDT. Mr. Sharood.

Mr. SHAROOD. Mr. Kiechel, yesterday and today we have been going through a kind of mind boggling examination of the Constitution and the commerce laws and case in controversy and so on. I have been listening to the chairman speaking with a number of witnesses on this point trying to figure out what is the issue here.

Just for my benefit, would you tell me whether or not I am phrasing it correctly. I think you are saying that there is no Federal interest in the lands above the high water mark and that therefore there is no right in the Federal Government to litigate the issue or title to that land. And by title I mean in the sense of whether or not there has been impressed on that land any prescriptive right on the part of the public to utilize that land as a common, and finally with regard to the dialog of the chairman, the question of whether the Federal Government has the right, as it does, to condemn that land is really an irrelevant issue. We are talking about apples and oranges when we talk about condemnation on the one hand and in effect a suit to establish or acquire title on the other hand.

Clearly on the one case the Federal Government can condemn. But when it comes to a question of determining title, apart from condemnation, the State is the proper entity to entertain such litigation and not the Federal Government. Is that reasonably accurate of what your position is?

Mr. KIECHEL. It is, sir.

Mr. SHAROOD. Thank you, Mr. Chairman.

Mr. ECKHARDT. Mr. De la Garza.

Mr. DE LA GARZA. No questions.

Mr. ECKHARDT. Mr. Dingell.

Mr. DINGELL. I listened, sir, with some care to the questions of Mr. Eckhardt and your responses. As I was listening, I observed that going down through the bill you did not really have any differences with the legislation on either policy or a constitutional question down through probably section 207; am I correct? I want you to read it very carefully so that we are clear on this because I do not want you to feel either trapped or that you are being led into making a statement that would not reflect your own position.

Mr. KIECHEL. I appreciate that, Mr. Dingell. I would have to go back to section 204, which is the section which confers Federal district court jurisdiction and suggest that is the section which we feel is lacking in support as to a case or controversy.

Mr. DINGELL. Let us go clear back to section 202. Do you have problems with section 202? It relates to the traditional right of the public to have free and unrestricted right to beaches as a common.

Mr. KIECHEL. That declaration, of course, is something we subscribe to. I am not so sure as to what the term "national" means as it modifies "interest" in line 14, Mr. Dingell. If that is the basis on which the later part of the bill is dependent, why then I suppose I would have to raise some question as to that. Whether a national interest means a legal interest, which would support the kind of litigation we are talking about, we question. National interest in public use of the beach is of course something we all subscribe to.

Mr. DINGELL. Let us look at that. I think it is unquestioned that the Federal Government has plenary power over navigation. That is set out in the Constitution.

Mr. KIECHEL. Yes, sir, it certainly is.

Mr. DINGELL. Pursuant to that power we issue permits to individuals to affect the quality and character of these beaches; is that correct?

Mr. KIECHEL. Yes, sir.

Mr. DINGELL. Is there any reason why the power of the Federal Government over navigation, plenary power, should not extend to the right to describe beach use?

Mr. KIECHEL. Well, yes. I do not think one follows the other.

Mr. DINGELL. Let's stay within the purview of the question.

Mr. KIECHEL. I want to answer your question, Mr. Dingell. As I said to the chairman, we are staunch advocates of the navigation servitude. We also recognize and litigate in reliance on such statutes as section 10 of the Rivers and Harbors Act of 1889 which prohibit interferences with the navigable waters and——

Mr. DINGELL. Construction of obstacles in navigable waters. That statutes has been constitutionally interpreted to mean depositing pollution in navigable waters of the United States.

Mr. KIECHEL. That would be section 13. I was referring specifically to section 10, which has more relevance to this situation.

Mr. DINGELL. Let's reason together from that. Pursuant to this, the Federal Government has now begun to treat land water development on beaches, and to require permits clear to the high water mark and not just current high water mark, but the high water mark. the ancient and traditional high water mark, and we have imposed upon developments in that area the requirements of the Fish and Wildlife Coordination Act, requirements of Natural Environmental Policy Act, and of permits issued by the Corps. We have clearly established the power of the Feideral Government in that area, have we not?

Mr. KIECHEL. Yes, indeed, sir.

Mr. DINGELL. Again I want to be fair with you. I want to give you the full opportunity to keep in mind, I am going to try to stay within as narrow a set of parameters as I can here, so we can address ourselves within a time frame to the trouble, to the problems

that trouble me. Why then, if these things are so, is it not within the power of the Federal Government to describe the uses, to describe the further uses of areas of which this kind of national interest or national concern should be allocated?

Mr. KIECHEL. We are talking here about the rights of the private owners——

Mr. DINGELL. Private owners are subject to zoning laws and subject to laws affecting the depositing of pollution in waters, subject to other kinds of public easements and so forth. Let us recall this. That common law also describes the rights of citizens to establish easements for long periods of use, and you must remember here that the Congress is essentially finding that these easements of citizens to walk up and down the beaches have been established through long periods of use, and essentially this bill recognizes that right. Do you have a quarrel with that thesis?

Mr. KIECHEL. The public access to which the chairman referred to, as established by law, prescriptive right or whatever you call it, as I understand it, arises by State law where statutes and court decisions in those States that have recognized——

Mr. DINGELL. In most instances it is common law. It goes clear back to English law.

Mr. KIECHEL. I am not sure that is correct. But I think we can agree that it is a matter of State law, Mr. Dingell. We are saying here of course that citizens are subject to the police power of the States and local government——

Mr. DINGELL. I am not saying that. I am saying citizens are subject, one, to the clear right of the Federal Government with regard to the permit issuing in areas which either are navigable waters or which immediately affect the quality and character of navigable waters. That is the first thesis. Obviously through this system of permits, and which we have established in the expenditure of funds which we have established for prevention of beach erosion and project development in these areas, we very clearly have established the kind of Federal presence and right that we are discussing. But I am now addressing myself not to that point, but I am addressing myself to the question involved in traditional rights of people to move freely up and down these beaches. This is an ancient right. It has been recognized.

I am curious as to why we could not or why not in this bill recognize that ancient right?

Mr. KIECHEL. As I understand, the thrust of this bill, Mr. Dingell, is to insure public access to beach areas. And using for the purpose, the usual State title situation, where there is private ownership to the high water mark, we are therefore saying that those private owners, those ownerships to the high water mark, must yield access to the people who are using the beach areas seaward of those private areas. That is what we are talking about here.

Now I say to you, sir: that there is no basis in Federal law that we know of which would enable a declaration that there is an existing right of public access through those private ownerships above the high water mark to the beach.

Mr. DINGELL. I want to yield to the chairman here, but I want to turn that one around and send it back to you. Where is there either

a constitutional, a statutory, or a policy prohibition to that kind of undertaking by the Federal Government?

Mr. KIECHEL. Prohibition?

Mr. DINGELL. Yes, sir. If there is statutory prohibition, where there is constitutional prohibition to us taking that kind of action?

Mr. KIECHEL. I would suppose it is the fifth amendment, which says you cannot take private property without the payment of just compensation.

Mr. DINGELL. If we simply recognize a right in the Federal Government under the power of, the navigation to establish certain uses in areas, and if we recognize the judicial rights of people of free access, how are we then infringing the fifth amendment rights?

Mr. KIECHEL. As I understand, this is not within the navigation servitude. We are talking about this interference, if you will, with private property. The navigation servitude does impose upon private rights this plenary power of the Federal Government to use the waters for navigation and other related purposes.

Mr. DINGELL. Navigation servitude antedates the Federal amendment. Unless you are here to allege the fifth amendment repeals the navigation servitude, I suspect that your constitutional argument falls.

Mr. KIECHEL. I am not here to argue for repeal of navigation servitude, sir. We litigate on that and rely on it.

Mr. DINGELL. Then the fact of the matter is that the fifth amendment did not appeal that servitude imposed by the Federal Government over navigation. I think it is really quite clear.

Mr. KIECHEL. I do not see here an exercise of the navigation servitude.

Mr. DINGELL. Sir?

Mr. KIECHEL. I do not see in this bill an exercise of the commerce powers of the U.S. Constitution.

Mr. DINGELL. I am curious to know how you can circumscribe that right. As I read it, it is quite clear. It is a very broad right.

Mr. KIECHEL. I am not suggesting it be circumscribed.

Mr. DINGELL. It has been extended by your agency, largely I think under the pressure of Congressman Reuss and myself, to apply to many things which are really not directly navigational related, relating to the question of an individual to develop certain areas for his private gain where it would have adverse effect on conservation, fish and wildlife values. The power to exercise that capability by the Federal Government for that kind of objective is, I think, rather clear. Unless you are here to challenge it, I suspect that maybe we ought to abate some of our arguments over the power or the policy of this particular matter.

Mr. KIECHEL. I am not here to detract from the commerce power and the navigation servitude, the exercise of Federal powers through sections 10 and 13 of the Rivers and Harbors Act, or the Fish and Wildlife Coordination Act, but I suggest to you very respectfully that they are not relevant to this particular legislation.

Mr. DINGELL. I find myself incapable of seeing how they are not. If you accept the philosophy that the Federal Government has certain kinds of responsibilities under the Federal Government in this kind of area, then suppose you tell us where those bounds lie? Do

they preclude the exercise of the kinds of power that would be set forth in H.R. 10394? And if so, how and where?

Mr. KIECHEL. I visualize this statute, sir, as having to do with public access to and the use of beaches. I visualize this in the usual way of a beach area, high and low water mark and private ownerships, which are adjacent to that beach area.

Mr. DINGELL. Now we are already agreed that the Federal Government has certain powers under navigation interests and so forth, plenary power has over navigation to circumscribe uses in areas which affect that navigation power and that navigation right; am I correct in that thesis?

Mr. KIECHEL. Yes indeed.

Mr. DINGELL. How would this bill go beyond the power of the Federal Government over navigation?

Mr. KIECHEL. To put it bluntly, sir, I do not see that it has anything to do with it.

Mr. DINGELL. It does if we say so. We are speaking to the uses which shall be undergone by areas affected by that plenary Federal power, are we not?

Mr. KIECHEL. I do not understand it so.

Mr. DINGELL. We already established that the use of lands and waters up to the high water mark is affected by that power and we have legislated over that, Fish and Wildlife Coordination Act, Water Pollution Act, the Flood Control Act of 1889. You are not here before us to challenge the validity of those actions?

Mr. KIECHEL. No, sir, nor am I here to challenge the validity of the actions of the United States by which it acquired by condemnation and purchase the seashore areas adjacent to the beaches in these particular areas.

Mr. DINGELL. We have not gotten that far yet. We are only talking about the power. Now the Federal Government has plenary power up to the high watermark, do we not?

Mr. KIECHEL. For certain purposes.

Mr. DINGELL. No, no, no, for all purposes which relate to navigation; is that not right?

Mr. KIECHEL. With respect to interferences with navigation and obstruction to navigable waters and those things within the commerce power, to be sure we do.

Mr. DINGELL. Let us then apply your thesis to the Fish and Wildlife Coordination Act, which says that fish and wildlife values will be given in consideration in connection with permits in this area. Do you challenge that, that is not purely navigation, that is related to the use of the area; am I correct?

Mr. KIECHEL. You say it is not related to the commerce power?

Mr. DINGELL. Under your thesis it is not directly related to navigation?

Mr. KIECHEL. Well the protection of——

Mr. DINGELL. It is not related to navigation, if I take your thesis. If I accept your thesis, it is an attack upon the fifth amendment rights of the owners——

Mr. KIECHEL. We are talking about the regulatory power of the United States under the navigation——

Mr. DINGELL. That is right. I would say it is as broad as any use the Federal Government wants to establish which relates to the

areas inside its powers to act, in other words, up to the high watermark. You say it is not. You tend to assume, as I understand your comments, that it relates only to matters which go to navigation. I cited to you the Fish and Wildlife Coordination Act and I cited to you the Flood Control Act of 1889, which if I understand your thesis correctly is an erroneous exercise of our Federal powers. I am just trying to ascertain the consistency of your position.

Mr. KIECHEL. I certainly want to correct any misunderstanding that my remarks may have engendered, Mr. Congressman. I am certainly not in any way derogating from the plenary power of the Congress with respect to the navigation servitude and the exercise of the commerce power of the U.S. Constitution, nor am I——

Mr. DINGELL. Having agreed on that fundamental privilege, do you assert that this servitude on this area is limited to the power of the Federal Government over those matters which are most intimately involved in navigation, or do you agree as Congress set forth in the Fish and Wildlife Coordination Act that we have the commerce power, relating to other issues, relating to fish, wildlife, esthetics . . .

Mr. KIECHEL. Commerce power is a very broad power.

Mr. DINGELL. So maybe when we are talking about the area inside, rather than outside the high watermark——

Mr. KIECHEL. I do not understand as you are applying it in this bill, that it is an exercise of commerce power.

Mr. DINGELL. Maybe you have given us a suggestion and a way out.

Mr. KIECHEL. I am here to be constructive and I hope I have been.

Mr. DINGELL. I am satisfied on that point or would not be engaged in this colloquy. I have taken an undue amount of time. There are other matters that I will perhaps ask at a later time.

Mr. ECKHARDT. Are there further questions?

There is one point I would like to clarify. Sir, in your statement you refer to the act of prohibiting an individual or requiring an individual to permit access to cross his property to the area here in question. That is a possible construction, I suppose, of section 203 of the act, and we have some discussion of that yesterday. I think it is quite clear that section 203 was not intentioned—and the authors of the bill would have no objection to make it clear—that it was not intended to deal with anything but the area in question and areas over which an easement had been acquired. Section 203 does not propose to impair the problem of access across the private property. I think 203 might be construed that way. If that is the way it was read, it should be amended to not purport to further extend the rights contained in sections 202, 204, 205, and the standards of 205 would have to be applicable, and something would have to be shown in order to impress any obligation on a littoral owner to permit passage over an area that is landward of the dune lines. I want to make that clear. I think your point is well taken, however, and the witness' point yesterday was well taken.

Mr. KIECHEL. Thank you, Mr. Chairman.

Mr. ECKHARDT. Thank you, sir.

The next witness is Prof. Charles Black, Luce professor of jurisprudence, Yale University.

STATEMENT OF PROF. CHARLES BLACK, LUCE PROFESSOR OF JURISPRUDENCE, YALE UNIVERSITY

Mr. BLACK. Mr. Chairman, members of the committee: I must begin by apologizing for my perhaps seeming discourtesy in not having been able to prepare a written statement at this time for this committee.

I can, if it is desired, reduce some of these views to writing rather promptly on my return to New Haven and furnish it, if that is what is wanted.

Anybody who holds himself out as a constitutional law academic by trade has been rather busy the last few days, for reasons which we need not canvass here. I really have not been able to compose anything on a subject as pleasant, and under the circumstances as inviting, as public beaches.

I do, however, have at this time some definite views, which I have considered now over a period of some years, concerning this bill. I think the basic strategic situation on its constitutionality is a perfectly familiar one, one that we keep finding ourselves in time after time. We begin with the obvious fact that it is of great national concern to the whole people of the United States to preserve, insofar as is possible, and as is consistent with the Constitution, access to this unique and wonderful natural resource, and when we find that kind of massive and easily visible national interest on the part of the people of the United States, our Constitution is such that we are very likely to find in it not only one but a number of grounds for action by the National Legislature in vindication and implementation of this interest. It is my view that that is exactly the situation with which we are confronted here.

Now I have divided my presentation, in a manner familiar to professors ever since the Middle Ages, into three parts. I know that sounds like a menace. I shall try to keep them brief.

I will just give the titles before I start. First, I want to set out what I conceive to be the basis in the Constitution for there being asserted by Congress a Federal interest in access to the beaches in the United States on both shores, insofar as that is consistent with the other provisions in the Constitution.

Second, I want to discuss the constitutionality of the general mode of implementation which is provided by this bill: namely, the provision of judicial jurisdiction in the U.S. courts for dealing with the subject.

Third, I will take up briefly the problem of the presumption which is created in this bill, and its appropriateness and constitutionality.

I think you will have detected from the tone of my remarks so far that I am also very much in favor of this bill on policy grounds, but I am not really an expert on that. I will try to keep my discourse within a constitutional framework.

Now the first ground, it seems to me, on which the Federal interest, the national interest, in the maintenance insofar as possible of access to the public beaches in the United States can be based is in the interstate commerce clause. I am very much interested, and

would find a great deal of merit, in Mr. Dingell's comments on the navigation aspect of that clause, in support of this bill. But I would think now of stressing another aspect. It is a fact that a very great deal, a massive amount, of interstate commerce and interstate movement of goods and persons is dependent upon and is a function of the accessibility of beaches.

I would point out that this is not the kind of pretextual and rather technical use of the interstate commerce clause which one finds in such statutes as the Lindberg Act or the Stolen Automobiles Act or the Mann Act. There is no question but that the trains and airplanes are simply full throughout the winter with people going to Florida. Out on Martha's Vineyard Island people come from all over the United States in summer, and there is a flow of goods into these places, and this movement in interstate commerce, which is plainly and directly a function of the accessibility of the beaches, is not just a technical peg on which one can hang Federal power, but is a massive set of transactions continually going forward and clearly constituting interstate commerce.

I should think that if that were all that we had, it would be enough. I must say, however, that I would prefer to go on to a second ground, which seems to me the real ground, the one with the real merit in it, with the constitutional language and concept speaking directly to what is at stake, and that is the concept of the people of the United States as the relevant public for the purpose of filling that term in a finding of a public easement or of a dedication to the public.

Let me expand that just a little and consider both the textual basis for it and the nontextual basis for it. Let me first clarify what I mean by it. If a beach is dedicated to the public, then it becomes necessary to consider what constitutes this public, what public this is. If a beach has over it a prescriptive easement on behalf of the public, then again it becomes necessary to consider what the relevant public is. Now the facts about these things are perfectly plain, as I have already indicated. The Florida beaches, insofar as prescriptive application is concerned, have been used freely from time immemorial by people not only from Florida, residents in Miami, but people from all over the United States who go there. The same, to my personal observation and knowledge, is true of the beaches at Martha's Vineyard Island, which I think are currently threatened by some of the enclosure movement that we find going on.

I think if we do no more than observe what is happening and where the people came from, to whom this dedication has been made, if it has been made, on whose behalf this public easement exists, if it does exist, we would have to conclude just from the observation of the facts that it was the people of the whole United States.

But the Constitution gives a great deal of body to that concept at a number of points. I would think, first, that the fourth article, the guarantee of the privileges and immunities, on behalf of the citizens of every State, in each of the several States, in conction with section 1 of the 14th amendment, which guarantees the privileges and immunities of citizens of the United States, when put together—the first guaranteeing equality and the second guaranteeing a protection

for these privileges and immunities—would constitute a firm textual basis for the holding that the privilege of using a beach dedicated to the general public is a privilege which must be enjoyed not simply by the people of one State but by the people of the United States as such.

Now we find that this concept, whether we rely on these texts or on others, has been given a good deal of roundness in the judicial decisions. It is, for example, not open to a State either to forbid a person's entry, as in Edwards against California, or to prevent his exit or put any burdens on it, as in Crandall against Nevada.

I would think, however, that one might most relevantly—thus capturing the real concept both of law and utility behind this—find that membership in the relevant public for the purposes of dedication to the public or of the ascertainment of public easement is really expressed most of all in the citizenship clause of the 14th amendment, the one which guarantees citizenship.

Now I do not mean by that to suggest that lawfully resident aliens would not enjoy these rights. I do not think that is a necessary conclusion from this at all. It would be infeasible, unwise, and probably a denial of due process of law to make a distinction such as that, which is so completely without rational basis.

But I think that it is the people of the whole United States, all the people lawfully here, that are the relevant people. They are the ones you will see at the beaches. They are the ones you would have seen there 50 years ago, and if there is a dedication to the public, that is the public, it is the whole public of the United States.

Now I would pass, thirdly, to the great physical involvement of the Federal Government with so many things concerned with beaches. I am sorry to say that since that matter is not covered in detail in the Constitution of the United States, and I have never really gone through all the relevant statutes—my other string to the bow being maritime law, which has rather to do with ships a good distance from the shore—I am not in a position to cite all those statutes, but I think matters of physical protection, erosion control are present, and rescue and salvage operations, for a few examples.

If a child gets lost off a beach and drifts in a sailboat on Martha's Vineyard Island, they call the Coast Guard, and the Coast Guard goes out to get the child and tow the child back. There is enormous and very complex physical involvement.

On those three grounds I would think you have a completely sufficient basis for the Federal Government's dealing with this question foursquare, limited only by the prohibitions against taking property without due process of law, and other constitutional prohibitions.

Now let me pass then to the measures. The first and principal measure which this bill takes in order to implement this interest is that of empowering litigation in the Federal courts. I might say, first, that it does not fit into my framework of thought to think that the objection, if any, to the use of this measure by Congress as a means of implementing the national interest in the public beaches, can be that it does not present a "case or controversy." It seems to me that the United States—if the bill is right on the merits, and if

it stands on meritorious constitutional grounds—the United States very plainly occupies—under the reverse implication of Massachusetts against Mellon—the position of parens patriae for the purpose of bringing suits in such a case. Once that point of standing is settled, the interests are clearly adverse, and every possible element of case or controversy is present. I think the problem, which I regard as a soluble problem, or the question, if I may rephrase it as that, having an affirmative answer, is the question whether there is a case or controversy which can be said to arise under the Constitution and laws of the United States. I think that the suits proposed by this bill are of that description, again for a number of reasons. The multiplicity of reasons is simply a function of the very clear and multiple interests of the National Government in this subject matter.

Now first of all, if I am right in thinking there is some kind of coaction, perhaps several different kinds of coaction, between the fourth article and the 14th amendment, a coaction that makes the citizens of the United States—the people of the United States—the relevant public for purposes of enjoying a public easement or the fruits of a public dedication at a public beach, then very plainly a suit brought to enforce this right is a suit directly arising under the Constitution.

I think there are different ways in which one can put these things together. Again I would prefer to pin it on the citizenship clause—coupled with a holding that the exclusion of aliens lawfully residents in the United States would be so arbitrary and so without rational foundation, given the constitutional command of inclusion of citizens, that they too would constitute a part of the people of the relevant public.

But if any of these constitutional grounds, connected with the identification of the people of the United States as the relevant public for the purposes of these two doctrines on which the bill relies, if any of these grounds is correct, then plainly all the suits under the bill would arise under these provisions, and the dealing with them is in fact rather moderate. I may add that, even if in some cases the dedication were not to the whole public of the United States—though I do not think a general dedication could be otherwise than that—but even if it were finally held that it was not, nevertheless it is strongly in the interest of the United States to litigate this question and to find out what the condition of the law is.

Secondly, I have always thought—and I have the honor of agreement from two of my colleagues, Professors Bickel and Wellington—that if the interest concerned is a commerce clause interest, then the step of using the courts as a means—simply providing for Federal jurisdiction over the subject matter while deferring to State law—is an entirely legitimate step, if it is considered one practically wise for the implementation of the Federal interstate commerce interest.

We do not invariably limit the Federal courts to questions, to issues and questions, which are purely Federal, or to cases which concern only Federal matters. For example, 1442, title 28, provides for the removal to Federal court of a number of suits against Federal officials. It may happen, and would not affect the removal

mechanism, that particular issues in the case will turn out to be in part, or even as a substantial matter in whole, issues of State law. Still we make this provision for removal, though the case is not named in article 3, because we can see this to be a proper step in the implementation of the independence of Federal officials.

Now, similarly, it has seemed to me always, as it has to my two colleagues, that it is a moderate step, a step differential to State law, to state that for the present, as to this subject matter in which there is such a strong Federal interest, we will go no further than providing a judicial forum in which that interest can be expeditiously vindicated, and funds and resources to see that it is expeditiously vindicated, without going any further than that in contravention of State law, as well we might if the subject matter is so clearly Federal.

Professors Wellington and Bickel, in their comment on Section 301(a) of the Labor Management Relations Act, 1947 stated: "* * * The point is simply that providing a forum for the enforcement of state law in a field which Congress could occupy is itself a species of regulation, a way of seeking a degree of uniformity while leaving the maximum room for the exercise of initiative by the states. It is a way of striving for a measure of co-ordination by consent and persuasion—a way of setting up something like a clearing house of ideas—for in following state law the federal-court system, even if subjected almost to the stringencies that have been drawn from *Erie RR . . . Tompkins*, is bound to make some creative contribution despite the fact that state courts remain theoretically free to resist federal guidance. Since the federal circuits do influence each other and operate under a single Supreme Court, this contribution in turn is bound to tend in the direction of harmonizing state policies. We are dealing by hypothesis with matters of at least potential federal concern and so the tendency to harmonize will be more pronounced than it has been in the diversity jurisdiction subsequent to *Erie* * * *"[1]

Mr. BLACK. Now a third ground, which has been raised already by the Chairman, but which I want to repeat and expand on, seems to me entirely sufficient in itself, abundantly sufficient, for sustaining a judicial jurisdiction in cases of this type—the ground, namely, that in two very important ways the establishment of public dedication or public easement in beaches anywhere is ancillary, practically ancillary, not ancillary as a matter of pretext, but genuinely ancillary to the exercise of the Federal right of eminent domain.

It seems to me the Chairman has made an unanswerable point, that if you are going to condemn beaches, you certainly do not want to go in there and do it without litigating the title, if there is any question of title. If it is not necessary to spend Federal money in condemnation proceedings, then you do not want to spend it.

The most practical thing in the world is to provide that the condemning court, if condemnation is to take place, may first ascertain whether there is any occasion for condemnation. The opposite of that seems to me not rationally tenable, because it would mean that if anybody set up any kind of title or right, however erroneous, then

[1] Bickel and Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 Harvard Law Review 1, 20-21 (1957).

the Federal power would have to go in and condemn and pay for that right without litigating the question whether it existed.

I think, however, that this power is ancillary to the condemnation proceeding, and to its objectives, in what is probably an even more important way, though one equally clear, and that is in the sense that there will be, or should be, or Congress certainly may provide that there ought to be, an on-going policy of maintaining an adequate public beach system for both shores of the United States. Now for the purposes of that policy, adequate beach facilities would be in part formed by condemned beaches, by beaches taken under the power of eminent domain. Now the first question that any sensible person governing that policy or deciding on it will ask himself is, "How much have we got already?" The question of how much we need to condemn is directly, arithmetically, the exact reciprocal of the question of how much we already have in the public domain.

It therefore seems to me that providing for continual on-going ascertainment of public rights in beaches is in the most practical way ancillary to the efficacious and wise exercise of an unquestioned power, namely the power of eminent domain, which everybody concedes exists beyond a doubt.

Now, I do not think this is necessary, but if one thought that it were necessary to find that the suit arises under this very bill, I think there is enough in the presumption section and elsewhere to justify that. I do not think one has to have recourse to that though, and I think it is quite unnecessary.

I think in sum that the power to enforce the rights of the people of the United States as a public, which is the relevant public for the easements and dedications, the power to deal in this way with the Federal interest in massive interstate commerce movement, of which the public beaches are the stimulus and which their availability deeply affects, and finally, and in my view, the absolutely conclusively this double ancillary connection with the eminent domain power, form an overflowing set of grounds for sustaining judicial jurisdiction as a method of choice, as an implementation of the Federal interest which I have previously gone into.

Now as to the presumption, I think I can deal with that very briefly. If I am right about what I have said up to now, if the beach in question is or would or could be contended to be a public beach, and if the U.S. public is the relevant public, then the adjustment of evidentiary rules for determining whether that situation exists, where a plausible case can be made for it on one side, is not only a permissible step, but again an exceedingly moderate step. The substantive State law is left unchanged. I do not think it is necessarily true that the substantive State law would have to be left unchanged, in view of all of these powers that I have mentioned. I think some regulation, perhaps short of condemnation, regulations in the nature of Federal zoning, might be conceivable. We do not have to go into that idea, because all Congress would be doing if it passed this bill is to take the relatively moderate step of simply saying that, since the burden of proof must fall somewhere, since there must be some presumption, since we have to start at some point in a lawsuit, let us start at the point which sets up the prima

facie case on the part of the public of the United States, which the United States as parens patriae is representing.

Second, if we go to the condemnation interests, it would seem to me again rather clear that the United States has an absolutely paramount interest in the question whether condemnation is necessary, whether, in other words, public money is being given away or needlessly spent. That is what you are doing when you pay for something without ascertaining whether the other party owns it or not. The Government has a paramount interest in this continual formation of a policy of condemnation, which cannot be intelligibly formed without the ascertainment of how much we already have in the way of beaches.

It seems to me, again, that the prescription of a rule of evidence as to presumptions in these cases is a very moderate step.

I do not think there is any serious question about the collision of this step with either of the due process clauses. The one in the 14th amendment does not bind the Federal Government. The one in the fifth amndment does. But, since they are identical in wording, all one has to ask oneself, if one wants to address himself to the question whether the setting up of a presumption of this kind, rebuttable by evidence, is a violation of due process of law, is simply to ask oneself whether a State could do it. I think it is plain that a State can do it, that a State would not be inhibited by the 14th amendment's due process clause from providing that the conduct of a lawsuit should go forward in the manner which is compelled by this presumption, with respect to something which has the physical characteristics of a beach, which is identified so clearly in this bill, and if it would then it can hardly be a step lacking in due process of law under the not be a step lacking in due process of law for a State to do that, fifth amendment for the Federal Government to do it.

For all of these reasons I find, first of all, that I am not going to recapitulate them because that is another wicked tendency of the academic profession—I find under the three heads an overflowing set of substantial Federal interests connected and linked up with the Constitution in the availability of these public beaches.

I find the provision of a judicial forum for enforcing, for ascertaining, first, and then enforcing the presence or absence of public easement and public prescription, to be a step which for many reasons is well within the bounds of both wise and constitutionally permissible implementation of these Federal interests. I find nothing in the presumption set up by the bill, rebuttable by evidence as it is, which either is a step that is grossly disproportionate to the interest that is being served, or in itself, can be held to violate due process of law.

Now with that, and a copy of the Constitution by my side, I will close my presentation at this point, if I may, thanking the committee for their attention.

Mr. ECKHARDT. Thank you, Professor. Mr. Dingell.

Mr. DINGELL. Professor, I would like to address myself, first, to the question you raised with regard to the shifting of burdens under the section of the legislation relating to presumptions. Synthesized, I think it was your position that the establishing of presumptions

and the weighing of presumptions is a procedural matter which absent the circumstances of becoming substantive, fall under the 5th and 14th amendments——

Mr. BLACK. I think that is true, I think that is generally true, Congressman. I would, however, want legitimately to color the answer to the question with a reference back to the point that, given the enormous Federal interest in this, and the multiple grounds of Federal jurisdiction, the adjustment of presumptions in this was a very moderate step. I do not mean to speculate on how far you could go. Given the Federal interest I have been talking about, I think just starting off with a presumption in favor of the public, since you have to start somewhere, is an entirely reasonable step and in no way comes even within the foothills of the prohibition against the deprivation of property without due process of law.

Mr. DINGELL. I would like to address myself to the plenary power over navigation. That goes clearly to the high water mark; is that correct?

Mr. BLACK. Yes, sir; that is correct.

Mr. DINGELL. Without question or controversy?

Mr. BLACK. I think that is correct.

Mr. DINGELL. It is not conceivable to go inside, in short, high water mark, could it not?

Mr. BLACK. There is an interesting case, the United States against Coombs, decided long before the Civil War, in which it was held there was jurisdiction to punish criminally the theft of goods which had been washed up a long way on the shore, simply because they had once been in navigation in interstate or foreign commerce. This is a case very little known. Constitutional law casebooks do not seem to pick it up, but there it is.

I do not think it has any direct relevance to this problem as such. But it indicates the reach of this Federal concern.

Mr. DINGELL. The establishment of the high water mark does not then necessarily become holy writ with regard to the bounds of the Federal Government over navigation; am I right?

Mr. BLACK. That is certainly right. I will have to say in all candor that I regard the interstate commerce aspect shoreside—that is, the enormous and the massive movement of goods and persons which occur within the continental United States because of the accessibility of these beaches as perhaps a more, let us say, more massive ground than the navigation power. Though I think we find, as we often do, there are any number of Federal powers here, all of which are implicated.

Mr. DINGELL. I would like to within the bounds of this one particular matter. Now we have constructed under this Federal power of navigation facilities and we have been engaged in permits above the high water marks, have we not?

Mr. BLACK. We certainly have. On the rivers we have used it in a rather paradoxical or reverse sense. That is, we have used the power over navigation even for the purpose of impeding navigability with dams and in power matters.

So it is a power which has been given a very great reach, a very long reach; yes, sir.

Mr. DINGELL. My thesis would be perhaps reduced more simply to the fact that the power of the Federal Government over navigation would at least reach to the highest point in which waves will come in shore, am I correct?

Mr. BLACK. I think that is probably right. I must say that I have not researched that point, perhaps in a way that I should. I had found these other grounds so persuasive that I had not, had not really done the work that would entitle me to answer that.

Mr. DINGELL. It is not illogical——

Mr. BLACK. No sir, it is not. I could not give a responsible answer just now, but it is certainly a point which I would be very far from rejecting as implausible or anything of that sort.

Mr. DINGELL. Now we find ourselves now further in the position where the Federal Government would be able in areas peculiarly affected by its jurisdictions, such as navigation, to deal with the question of easements. For example, an easement is usually a prescriptive right that is achieved by long use——

Mr. BLACK. That is usually the situation on these beaches.

Mr. DINGELL. The person that asserts the easement, asserts it under the public policy of the Federal Government, does not recognize the right of another person to question it, such as the fee owner, who could not complain that the right of the individual crosses over his land, because this has been a widely held public right for a period in excess of 20 years.

Mr. BLACK. Often for hundreds of years in the case of many beaches.

Mr. DINGELL. Having once established this right of way or right of use, which would be perhaps the broader term, as a matter of public policy, we do not permit the owner of the fee to come in and challenge or quarrel with that right, is that the thesis under it?

Mr. BLACK. We could permit him to come in, but he would lose. What we would be proposing in this bill is that before his——

Mr. DINGELL. You are getting ahead of me. On the other hand, if we find that if the owner fenced those individuals off for a period of 20 years or whatever period the State would recognize, that we would then say at that point the State had violated the right of the individual to engage in this adverse use?

Mr. BLACK. That is right. That is of course at the heart of the need for this bill, and we need to get energetically to work to see that does not happen.

Mr. DINGELL. What I am saying is, we then have established within the Government the power to recognize a right or to deny the right.

Mr. BLACK. Right.

Mr. DINGELL. And that if we say no longer does the power to abate the right of citizens to use these features freely exists, that we would essentially be on the grounds of public policy quieting the power of somebody to come forward in the court and say that I have now fenced you out for a period of 20 years and you may not therefore assert this prescriptive right to the land, is that correct?

Mr. BLACK. That is the contest.

Mr. DINGELL. That is essentially what the bill would do. It would essentially quiet the right of an individual to challenge this ancient right established by prescriptive use to——

Mr. BLACK. Yes. And most vitally it would do so before his prescriptive period had run. That is why this legislation is really needed. If it were not that he was going to acquire rights by prescription, possibly defense of his own rights would be adequate, since the public could plead the public right in defense. That is not the situation we have. With respect to the general public I think it is——

Mr. DINGELL. Is it a fair thesis then that this is a procedural matter as opposed to a substantive matter?

Mr. BLACK. Now that takes me all the way back. I have the feeling that I may not have followed your line of questioning altogether, because my thesis here is that it is both, that is the use of a procedural device, but for the purpose of vindicating a very massive Federal substantiative interest in the whole subject matter.

Mr. DINGELL. I see. Thank you.

Mr. ECKHARDT. Mr. Potter.

Mr. POTTER. Professor Black, yesterday the representatives of one of the Federal agencies suggested that, one, they really did not like the idea that there was or should be a federally guaranteed right of access to the beaches; and two, if there was such a right, they were worried that that right, promiscuously exercised, would result in the effect of destruction of beaches that they were trying to protect.

Do you believe that if this bill were enacted and the kinds of access to which the bill addresses itself were to be guaranteed, that there would remain in the Federal or State government the right to control that access so as to preserve the integrity of the beaches themselves?

Mr. BLACK. I am glad you are stating somebody else's argument, because without fear of discourtesy to you, I can simply say that I look on the argument as wholly untenable. As in the case of every other public place and every other situation affected by public interest, the Federal and the State governments, by appropriate police regulations, tailored to the respective interests, can take care that there be no destruction, and that the asset be preserved intact. That, indeed, I think in a rather reserved way, is one of the objectives toward which this bill is moving, if it does not get there entirely itself. Of course they do. No question about it.

Now the only thing would be that Federal regulations, insofar as they were valid—and I think they would be valid over a pretty wide range—would, under familiar principles of article VI, supersede, perhaps sometime preempt, State regulations, but that is the same situation we have with every regulatory field where there are concurrent State and Federal interests. There would be, in my opinion, for a long time, if not forever, ample room for regulatory activity on the part of the States. I do not see why not.

Mr. POTTER. To the extent that the Federal Government did not enter the field?

Mr. BLACK. That would be one of the factors, surely. If there were valid Federal regulations, and I can imagine that there might sometime be valid Federal regulations which, under the wide scope of power I am talking about, would be valid, then it is clear that the State regulations cannot conflict with those. If they are comprehensive and appear to be intended to cover their entire subject matter, then under the very difficult and puzzling set of doctrines which we

label by the name of "preemption," it might sometimes happen that the whole field, as to one beach or as to all beaches or as to some beaches, would be preempted. We have that same situation in every field of law where there are concurrent interests on the part of the Nation and the State.

If I may go back to one thing that you said, however, I think it is worth continual clarification that this bill, as it now stands, does not go as far as perhaps Congress might go, because it does not guarantee access to any particular beach, if under the State law that beach is not dedicated to the public and does not have on it a public easement, and it refers to State law. So it really is a national interest, a very clear-cut and intelligent national interest in preserving both physically and as against the possible running of a prescriptive period, those beaches are open to the public, and it identifies the relevant public by implication as the public of the United States, the people of the United States.

Mr. POTTER. That raises another issue. The attorney general of the State of Oregon indicated that he was distressed by the fact that under this bill Federal courts would, in effect, be applying State law and that the State courts, to a very large extent, really had not addressed themselves to the issues at all.

Mr. BLACK. But the Federal courts supply State law in very many cases today, where there is a concurrent Federal interest, which is conceived to require implementation by bringing the subject under judicial jurisdiction. I read his statement, and he mentioned diversity cases. Of course that is the most obvious case where this happens. But we also have many others, bankruptcy cases, admiralty cases, where State law is brought into play, where the Federal interest is expressed in the conferring of a judicial jurisdiction for handling the whole matter, the whole controversy, and at many points, either originally or further down the pike in the law suite, the State law may become relevant and the Federal court tries to apply it as best it can.

I do not think he is making a sound distinction even from diversity cases when he says many of these issues have not been settled by the highest courts of the States concerned, because that is also true of a great many issues that arise in diversity cases. There is no guarantee that an issue which is brought up in a diversity case will be one on which the State supreme court has spoken.

It is true in bankruptcy cases. It is true in admiralty cases, and so on. It is a familiar everyday thing that the Federal courts shall apply State law, and I think that was indeed the original function which it was thought they would have, in the main, as it was the fact that there was no Federal question jurisdiction, except for a brief interval, until 1875, and the main business of Federal courts was exactly that if applying State law in diversity cases.

Mr. POTTER. Let me change the subject again. Let us assume that this law passed. Let us assume further that you are the owner of a lot of beachland, which we may for purposes of our argument call Blackacre. Let us assume the public has a right of access to Blackacre, that their access to this has not been rebutted. Let us assume, finally, that you, therefore, make use of Blackacre in such a way as to, in effect, prohibit the public access to the beach. Can the public's

right of access be lost itself by prescription and under what law, Federal or State?

Mr. BLACK. The public right of access could be lost by prescription, just as it has been acquired in many cases by prescription. It would be a matter, I should suppose, of State law, unless and until Congress chose to implement these massive Federal interests by substantive provision respecting prescription. I think they can do that, but one does not have to go along with that to go along with this bill.

As the bill stands, and as matters now stand, it would be a question of State law. The great merit of the bill is that it provides a mechanism by which that result can be prevented in a timely fashion.

Mr. POTTER. My last question is really for clarification. The section on presumption of burdens, is not entirely clear in my own mind: whether or not this more precisely describes a burden of proof or a burden of going forward with the evidence to show that the public's access has been lost. How do you read it?

Mr. BLACK. I think that what it ought to be, and this as you know is a most complex field of law, and it is very often hard to tell from a mere statement of presumption which it is. I think it ought to be a real burden of proof, that is, given that something is a beach, that fact should be some evidence to support a finding that there is a public easement over it.

It would depend on a great deal more factual investigation than I have made. If we found actually that this was very commonly the case, then I think this would be a reasonable presumption. I would trust the Federal judges trying these cases or juries empaneled in cases where the jury trial was required to weigh that presumption against affirmative evidence, brought forward by the littoral owner, of the absence of such a prescriptive right, and I think that that would be where I would probably come down on it.

I believe, in order to decide which I would prefer, I would need to make a factual investigation which I have not made of the probable connection in fact between the possession of the character of the beach and the existence of the public easement or servitude or dedication over it. If it turned out to be a rarity, then one would conclude that this presumption should be no more than one which vanishes on introduction of contrary evidence.

If it turns out to be a rather common circumstance, so that the movement going on now is something like the 18th century enclosures in England, where a great deal of land was open and the enclosures took place in contravention of what had previously been a widespread practice, then I think a presumption which was a genuine burden-of-proof presumption would be entirely and rationally justified.

I think the decision there is very much up to Congress. That is the kind of question that a legislative body or committee like this can investigate and come down on, much more easily than can a court of law.

Mr. DINGELL. Will you yield at that point. This does not involve any question of constitutional rights as between choices of the first over the second.

Mr. BLACK. I think you could get a presumption, particularly a genuine presumption that shifts the burden of proof, which is so

irrational and so totally unconnected with fact, that a due process question might be raised. I do not think that is true of this one, as a matter of general public observation and knowledge. I think that the factual judgment whether it is true is a matter for Congress and one which I have not gone into so I really cannot come down firmly on that of my own knowledge. I would have thought in general that the beaches of the United States had been used freely, and that the case of the individual ownership coupled with the absence of the public easement of public dedication was on the whole the less common situation.

But I think the public easement and servitude would have to be rather definitely uncommon before Congress would be lacking in justification to set up a burden of proof of this kind, given the fact that it is not a conclusive presumption at all. Evidence can be introduced to rebut it.

The question at that point just becomes whether we are going to trust the judicial officers of the United States to proceed fairly in these cases. I do not think we have any reason to doubt this as to them, anymore than we would have as to State judges, who could be presented with exactly the same question.

Mr. ECKHARDT. Mr. Sharood.

Mr. SHAROOD. Professor Black, I with all due respect honestly am not an expert in constitutional law——

Mr. BLACK. I doubt, sir, that there really is such an animal.

Mr. SHARWOOD. If there is anybody in the room that could claim that distinction, it is undoubtedly you.

I would like a little clarification of a couple of points you have made. My recollection of these issues has unfortunately gotten very hazy. On this question of the right of the public, of the people of the United States to enjoy a use of the beaches, you find this in the grounds of the Constitution. If a State were to enact a law investing littoral land owners with title to all property to the low water mark of that State, would that law be constitutional?

Mr. BLACK. I am inclined to think that it would not, on the assumption that previous to the law there had existed a public right Of course it would be constitutional, it would not even be necessary, if there were no public easements or public dedications. If there are public easements and public dedications, then a law extinguishing them would seem to me rather clearly to be a law that deprives a large number of people of their liberty or their property or both, without due process of law.

It simply takes it away from them.

If previous to this the people of the United States had enjoyed the right to go on the beach, then a State law which took that right away from them would be simply confiscatory.

Mr. SHAROOD. Assuming that enjoyment up to that point in time has been littoral owners, with no public dedication, and I assume by public dedication you mean a statutory sense, by title being vested in a public agency——

Mr. BLACK. No, sir. I think that is one thing we need to get very clear as to this whole subject—that neither as to a public park, nor as to a public street, nor as to a public beach is it at all relevant to

the issue of public dedication or public easement that the fee title may remain in somebody else.

The location of the fee title might be anywhere. In some States, for example—and this shows how unimportant it is because I do not know if this is true in Connecticut or not although I own a house there—in some States fee title runs out to the center of the highway or street. That was true, I think, in Texas at one time, and it was a kind of kiss of death, because what you got out of it was you got to pave that part of the highway and pay for it.

But nobody ever thinks about that, or knows about it, because the cars go freely, enjoying a public easement.

Mr. SHAROOD. How does dedication, your use of that term, arise?

Mr. BLACK. There could be a dedication I believe under the common law coupled with a gift of the fee to some public body as a trustee or a dedication without that gift——

Mr. SHAROOD. Does dedication come about simply from custom and usage?

Mr. BLACK. Sometimes it does, yes. It really is difficult to distinguish between that and the public easement. I think in the last analysis there is not any difference between dedication of public use and easement. You go about it in different ways, but in the end either one of them can be established many times by prescription. The difference between them is that sometimes there will be certain actions of the dedicator which might result in dedication before time for a prescriptive public easement would run. I am reciting here, if I may say so, on the fine points of the common law, that I really am not competent to straighten out without going to look at a few books, but it does not matter in the practical situation. As to these beaches, the difference between a public easement over the beaches, which consists in the right to use them for recreational purposes, and a dedication to the public, it is not so material, as there might be alternative grounds available in those cases, or one rather than the other, might be available in a particular case, but what they come down to is much the same thing.

Mr. ECKHARDT. Would the gentleman yield on this question of dedication and prescription. It is a very interesting thing that the Texas court—in the first one of these cases, the *Seaway* case, really slides between implied dedication and prescription rather easily, and to a certain extent the same thing is true in the two California cases.

I think where the court prefers to use implied dedication, it is doing so because implied dedication does not necessarily rely traditionally so much on the same persons using the property over a long period of time.

Thus the implied dedication is easier to come by with respect to continuity of different people.

On the other hand, the court finds a little difficulty with implied dedication in California where it was pretty obvious that the people who were littoral owners really did not want to give up that property, and implied dedication in some of the common law cases has some implication of a willingness to turn over to the public, so in the California cases, though they used implied dedication, for example, really they rely more heavily I think on prescription.

The *Oregon* case has to run down both these points where there is long customary use that the land is impressed with that customary use, and the public is entitled to continue to exercise it.

Mr. BLACK. If I may make a general point about this, these questions one and all are questions of State law, and under this bill they are left open and would probably be settled differently in different States, by one or the other doctrines relied in different forms. It would just be a question about trusting Federal judges, as we trust them in so many other matters, to deal fairly with questions of State law.

So that this bill does not change State substantive law. It might turn out, as far as this bill is concerned, that there never had been a dedication to the public, nor did there exist a single prescriptive easement on the part of the public, in the whole United States, if State law actually, on fair inspection, turned out to produce that result. I do not think, however, that that would be true.

Mr. SHAROOD. Listening to your statement, I got the impression that you were almost reaching the point where you would have to conclude that there was in effect a common law right on the part of the public to access and use of the beaches of the United States, but apparently you are not prepared to go quite that far, notwithstanding your reliance on the 4th and 14th amendments; you do believe that this is a question of interpretation of State common law and usage?

Mr. BLACK. Let me say this, and I will try to be precise about this, I have committed myself and gladly commit myself to the proposition that if a State has a law of dedication to the public, either by easement or by dedication, the relevant public for that purpose is the people of the United States. As to all beaches that I have ever seen, it is evident that the people that are using them and acquiring prescriptions come from different States. That does not mean in and of itself that any State has to have such a law at all, has to have any public dedication.

A dedication to the "general public of California"—so terrible and unmanageable a thing as a rule by the State of California that all the beaches up and down the coast of California could be used by, but only by, California residents or citizens—would seem to me to violate the Constitution, because I think the Constitution, in these multiple ways, putting these things together, would forbid that kind of discrimination, and that is just anothe rway of saying that if there is a dedication to the public, it is a dedication to the public of the United States as a public.

Mr. SHAROOD. If this is an issue to be received under State law, as interpreted by the Federal court, then I am a little confused as to why you suggest that the bill be further amended to guarantee a right of access on the part of the people of the United States?

Mr. BLACK. I am not sure. I do not recall having made such a suggestion.

But the answers to questions you ask, for this reason, sir, could vary 50 ways. There are 50 different States—not 50 on the ocean—but all States on the ocean could vary.

Mr. SHAROOD. I believe you did. I may be mischaracterizing your statement. But it seemed you felt we should go one step further in

this bill and provide to assure that not only is the right of these beaches pretty clear, but that there be access.

Would not that question as well as the question of right be determined under State law?

Mr. BLACK. If I made such a statement, sir, it was an inadvertence. I would say that I think it likely, though not necessary for consideration in connection with this bill, that some substantive operations could be performed by the Congress on the law of use and access to public beaches. I am not prepared on that question, because I do not think it arises on the face of this bill.

As to the Federal common law, this bill does not, I believe, in itself declare the existence of any such thing. I think that there is a possibility with or without this bill that the Federal judiciary might be persuaded by some of the arguments that might support such a common law.

For example, I think, without this bill, that the Supreme Court unquestionably would hold unconstitutional a limitation of the beaches at Martha's Vineyard Island to residents of Massachusetts. I do not think there is any question but that they would do that. They would not allow that under article 4, so that there is some Federal law.

I do not think that it is likely that the Federal courts, either with or without this bill, would set to work to develop a general Federal common law of easements, servitudes and dedications of beaches, so that if a State does not admit any such doctrine, for example, and sticks firmly to the proposition that every littoral owner, regardless of what has happened, regardless of the hundreds of years of public use, may nevertheless build down to the high water line and obstruct that use, then this bill does not touch that question.

I certainly did not intend to suggest that this bill be amended. I was, I think, suggesting—and if I went further, it was a sheer verbal inadvertence—that there is a possibility, an interesting possibility not raised as an issue on the face of this bill—that there may be some room for the development of substantive law in this field by Congress.

Mr. SHARROD. On this final question, when the Federal courts are entertaining a diversity case, what rules of evidence govern it?

Mr. BLACK. I am not an expert on this. I really do not know.

Mr. SHARROD. It is my impression, for example, that in an automobile case, the evidentiary rules of the accident, in terms of such things as, let us say, avoidable accident, last clear chance, or what-have-you apply.

Now would it not be also true that in the *Lucy* case or the case comparable to that arising in this legislation, that the rules of a State where the beaches will be—well, the presumption applies: can the Federal Government—what is basically an application of State law—draft its own unique set of evidentiary rules on how you are going to arrive at the decision as to what is or is not the fact under State law?

Mr. BLACK. Let me make two replies to that.

First, that the situation as to evidence and rules of evidence in diversity cases and elsewhere in Federal courts is in such a state,

such an unsatisfactory state of confusion, that another committee of this House is now working hard on a code of rules of evidence for the Federal courts. so I would not point to the situation now as anything necessarily desirable.

More fundamentally, I would say that one has to look at the interests which are vindicated by this bill and by the diversity of citzenship jurisdiction respectively.

Many people, of course, now think that there is not any interest, any valid interest. being vindicated by the diversity of citizenship matter. But if it is an interest, it is an interest in simply protecting the citizen of the other States from a prejudice which might easily exist against him in the State of the courts of the forum. And the approximation in Federal court to the same treatment exactly as litigants get in State court has no other basis than this desire for equal treatment—simply that it should be just exactly the same.

Now in this court we have superimposed upon that desire, and certainly to some extent changing it. a substantive Federal interest. one which is not just an interest in equality of treatment of citizens of different States. but also a much more definite and concrete substantive interest of preserving access to beaches where it is possible that that can be done.

Now it seems to me that. given that situation, the use of a mere presumption. which can be rebutted. as an aid, as a procedural aid, to the Federal courts. is entirely reasonable.

Mr. SHAROOD. Your presumption is a powerful tool, is it not? I would not put it in such slick terms.

Mr. BLACK. It is a powerful tool.

Mr. SHAROOD. It imposes a burden upon the landowner that would not otherwise——

Mr. BLACK. Certainly. Let me simply say that that burden has got to rest somewhere. and it seems to me within the ambit of rational confressional judgment. dealing with this massively national subject matter. to decide which of the two—on which of the two contenders it shall rest.

Mr. SHAROOD. Is there any precedent now of where the Federal Government. Congress. has statutorily even drafted a rule of evidence. where the issue is one that is to be determined basically under State law?

Mr. BLACK. I do not recall any right now. I would have to look into that. But. more fundamentally, I think that every constitutional step that has ever been taken by Congress has at one time been new. The question is really not in my respectful opinion whether this has ever been done before. but whether it is reasonable and stands in a reasonable relationship of instrumentation to a national policy.

We are always doing things which are new. The vast responsibilities contained in our Constitution leads us every decade into new steps. I do not think there is any reason, in principle. forbidding the setting up of a presumption with respect to the burden of proof on a State law issue which is at the same time closely implicated with a subject matter in which Congress has and the Nation has a very great interest.

I do not see any real difference in principle between that. and the presumption that a person has been kidnapped for 7 days, has

been taken across the State line. I do not think that that presumption, the latter presumption, was based on any scientific study of kidnappings, and of how long kidnappers tended to keep the victims in the one State. It was simply set up as a matter of procedural convenience, and I think that when you are not dealing with life—and until the recent Supreme Court decision, death—but with nothing more than State beaches, the question is not whether this has ever been done before, but whether it is reasonable to do it, as one has to do so many things for the first time.

I am not even sure it is the first time. I would have to look into it and see. There have been bankruptcy cases, matter of State law, admiralty limitation proceedings and so on.

Mr. SHAROOD. Thank you, Mr. Chairman.

Mr. ECKHARDT. Professor Black, on the question of presumption, I have been troubled for 2 days now by some of these who criticize the presumption as possibly unconstitutional, and at best undesirable because it seems to weigh the case in favor of the public. I have been troubled by the assumption that there is something particularly virtuous, something particularly in accordance with due process in starting out with the littoral owner being assumed to have the right to exclude the public, and the public then having to proceed otherwise.

I have got even prepared for me just for the purpose of finding out how these grants read all of the grants in Texas of all the littoral property on the Gulf of Mexico in these paper bags here.

I have one of them which is No. 7 in this group which deals with a grant in the county of Colorado in 1838, and it is rather typical, I think. It says:

> To the Gulf at low water mark the stake 66 vs from water on the sand mound thence following the meanders of the said Gulf to place of beginning.

Mr. ECKHARDT. The Spanish vara is roughly 3 feet, actually 33 inches. That means the point at which the stake was driven was about 180 feet from water at low tide. Now that would be just about the sand dune mark. What we are talking about here is a protected area. I think anyone who looks at this honestly cannot determine positively whether that was considered at that time mean high tide, mean higher high tide, or the vegetation line.

So it baffles me that some people seem to feel that there is some particular virtue in protecting the constitutional right to require the public to prove that this grant meant the vegetation line. It seems to me that this is precisely the same question as the requirement that the littoral owner prove that it mean, say, the mean higher high tide line or mean high tide line.

Mr. BLACK. You bring up a valuable point there that the question on the merits could sometimes not be that of an easement or dedication. Sometimes it may be that of the ownership of the fee altogether.

Now I would go, I would think, a little further than you have gone and say that I do not see any a priori reason why—any purely logical reason why either of these parties should be given the benefit of presumption more than the other. One of them is going to have to be. The question would simply be whether, when one looks over the entire situation of the enclosure of beaches, which have been or at

least have been thought to be open to the public, and the numerous questions of prescriptive rights, whether the one who claims the right to exclude the public from these recreational resources, created by the ocean, ought to be given the advantage, or the public ought to be given the advantage, since the burden is freely rebuttable.

I suppose if one had a whole lifetime, one could study these questions with respect to every single thing and finally come up with some conclusion validated in that way as to the suitability of the placements of the presumption.

We do not do that as to other presumptions. We do not do that as to the presumption of a gift being made in contemplation of death, if it is made within 2 years of the decedent's death. We do not do it with the Lindberg law, which I mentioned a while ago.

And since an important Federal interest is being vindicated here, it would seem to me that even though the question substantively is left by this bill to State law, it is well within Federal power to set up any such presumption as may not be so unreasonable as to collide with the fifth amendment.

I cannot see that this one comes anywhere near, within miles, of colliding with the fifth amendment, in the sense of its being so totally wrong or of such a wrong reversal of the rationalities of the situation that it is just abritrary and tyrannical.

Mr. ECKHARDT. Of course you properly point out that the description of the type I read has to do with what is intended to be conveyed as fee title. I have always felt that a fee title in that nature does not necessarily include the right to exclude the beach even though the beach is granted in the fee title and it is clearly so granted, so a second question arises as to what was intended by the grant.

Mr. BLACK. Certainly.

Mr. ECKHARDT. For instance, here is another grant which would go closer toward assuming that the fee title was intended to be at least down to the high water mark. The relevant part of the grant states: "to a stake and mound on the sand bluff 60 vs from water at low tide * * * thence along the beach at the margin of the water * * * so as to include all to the water."

Mr. ECKHARDT. One must try to decide whether that was intended to give the person owning the water the right to exclude persons from using the beach as a sort of common highway, there having been few highways in Texas at that time. These questions still seem to be unresolved by the grants.

Mr. BLACK. I think that is right. As to the recent State decisions, since I am interested only in the constitutional aspect of this—well, I do think they show to anyone that there are numerous intricate, historical, and factual questions in all of these cases, and that there is not really any evident ground for the assumption that, when the bare fee title extends to a certain distance, or at an extension of the fee, the right of the people is thereby excluded.

I do not know very much about this subject. I have a little idea from what I have seen on Martha's Vineyard Island. It has been, I think, sort of assumed that the general public can in general use the beaches there, unless there is some good reason why not. That

is the way it is up at Gayhead, for example, and it would be really quite absurd under the facts, and this is just one case I have observed, it would be quite absurd under the facts at Gayhead beach if some littoral owner built an obstructing structure down to water line and then said that the public ought to have to come in and overcome a presumption in favor of his right to do it, when the public has been using that beach continually for hundreds of years. Why should they have to come in and make an uphill case against his right to do this.

Mr. ECKHARDT. In looking over the various cases that have been decided on the subject, I notice certain common results. In the California cases, in the *Seaway* case, in the *Daytona Beach* case, and the *Oregon* case, and in the *New York* case, and the *New Jersey* case, which is *Neptune City* v. *Allen-by-the-Sea*. I think I have listed virtually all of the leading questions on the usage of the beach, I found three common elements.

One, the cases all culminated in a public right; two, they all rest upon a customary public use from time immemorial to cover expanse of time sufficient to ripen custom into prescriptive right; three, they all take into account the special character of the beach in the public interest area.

Though there has been some testimony here that to write a law of this type is too unnecessarily placing within a bed the whole question of beach rights, the problem is a practical one and does not seem to be that great.

The major cases come out, I think, with certain common conclusions, and I have tried to distill from them common elements. There is legal basis for concluding that the beaches are generally impressed with the public interest, that appears in all the cases; two, any owner of beaches holds them in trust for public insofar as the right of access to the sea is concerned unless (a) the sovereign is shown to have expressly provided otherwise, in the grant or statutory provision; or (b) by other means it is shown that the customary usage of the beach clearly rebuts the proposition of interest.

I fail to see this diversity, this cannot at least be brought together or be encouraged to be influenced by certain common elements of recognition of Federal concepts, like where the beach is, what the standards of proof may be, et cetera.

Mr. BLACK. I bow to your expertness on this. I have not read all of these cases. I would say this, that probably the most easily accessible source of data for judging whether this presumption is a rational one would actually be the cases that have been decided. If in general they come out in favor of the public, then this would be a very powerful argument for locating a presumption where this bill locates it. All you really want to know about a presumption like this is whether on the whole it is more probable that the beach will be held to be public than not.

I do not think you can ever really come to a determinate solution on that. The Congress has to make, in the end, an educated guess, as everybody always does when a presumption is set up. But the education of the guess progresses at least to the sophomore year when you begin reading these cases as you have done and find what you have found.

Mr. ECKHARDT. We also found this, I think, in the testimony against this bill. It seems to me that it is a kind of thread of philosophy that runs this way; that if we restrain ourselves federally, and if we to the greatest extent possible create sufficient flexibility to accommodate the bill to State land law, that somehow we have lost our jurisdictional mandate under the Constitution. It certainly is true that this bill is extremely deferential to State concerns.

In the first place, it provides for these prima facie showings obviously relating to prima facie showings under State law. I think that is well borne out by section 202, which in expressing the Federal interest says "to the full extent that the public right may be extended consistent with such property rights of littoral owners, as may be protected absolutely by the Constitution."

Of course those littoral rights must refer to State littoral rights to property, as of course to a certain extent impressed and influenced by the purposes of this bill.

And section 205, as I say, sets out this standard. Section 206 says, "Nothing in this title shall be held to impair interference or prevent the State's (1) ownership in its lands and domains, (2) control of the public beaches in behalf of the public" and even if these lands are obtained, as a result of this suit, they fall within the control of the States.

Section 207 provided that there shall be a State-Federal partnership with respect to the operation of the suit.

Section 208 puts all facilities of the Federal Government within the area of the States' use for the purpose of protecting their beach rights, and then later sections provide grants to States.

Do you find that that deference to the States concern and that bowing to certan title questions on the basis of State law destroys Federal court jurisdiction under article 3, section 2, or in any way lessens it?

Mr. BLACK. I would give two answers to that.

One walks around it a bit, and the other is directly responsive to what I take to be the implication of your question.

The one that walks around it, of course, is that as I previously said, I think there are constitutional grounds for seeing the relevant public as a national public, in all of these cases of public dedication, or at least in a great number of them, and in that sense the suit might be said to arise under the Constitution.

But I think if you read section 202, I am not at all sure that it is just a declaration of purpose. It may be it is, but I am inclined to think it is, upon consideration, a rule of Federal substantive law, which is designed exactly to reach out and meet State law, because Congress declares and affirms that the beaches of the United States, as they have previously been defined in the bill, are impressed with the national interest. That is a kind of vague declaration, but then it goes on and says that the public shall have free and unrestricted right to use them as a common, to the full extent that such public right may be extended consistent with such property rights of littoral owners as may be protected absolutely by the Constitution.

That refers, of course, to the provision against taking property without due process of law or without compensation for public use,

and up to that point it is the declared substantive intention of Congress to exercise the full reach of its power.

Now, Mr. Chairman, I am rather inclined to think that, although it is deferential to State law, and although it does, like so many Federal laws—sharpnack criminal type of law, and the bankruptcy law and so on—reach out and meet State law and give appropriate effect to State law, at the same time it is directly declaring and affirming a rule of Federal law, as to all those cases of beaches which do not fall within the ambit of protection by the States or of the due process clause.

On that view, the inquiry—and I think this is probably right—the inquiry whether a beach is protected against State law is a Federal inquiry in itself. It is an inquiry, like the Longshoreman and Harbor Workers Compensation Act, as it was formerly administered, as to where the reach of the Federal law principle ends. I think that is really right, that it is setting up a Federal principle of law which is to extend to a certain defined point, namely the point at which the State creates a property right which is protected by the fifth amendment.

If that is so, of course all questions about whether these cases "arise under" Federal law, for that as well as the other reasons that I have gone into, simply collapse.

Mr. ECKHARDT. Of course there is another narrower clear extension of Federal policy in the section, and that is that where such properties can be protected for the public use on the basis of this act, not in the sense of the State having bought the property, there is an absolute requirement that the public trust be respected, that there not be any impairment of use, of ingress, and egress.

For instance, a State by virtue of declaring that the beach had been dedicated to the public for a period of time could not block it off and park road building equipment on that area and exclude the public, so in that sense the act speaks directly in authority to the State in a substantive way.

Mr. BLACK. Let me say another thing that has occurred to my mind about this presumption. One of the grounds, and I think it is an irrefragable ground, that simply cannot be gotten around, when one considers what has been done in this bill, is its double ancillary character with respect to condemnation, of which I spoke awhile ago. In that case, if you justify the act that way, and it is one of the ways which in my view clearly can justify it constitutionally, then the basic interest served by this presumption is the allocation of a binder of proof concerning the unnecessary spending of public money.

The presumption expresses the interest of the United States in adopting certain procedures in respect of condemnation, sometimes directly by independent condemnation proceedings, and sometimes by a proceeding under this act which could be twofold—that is, it could aim first at deciding whether the property has got to be paid for, and then at condemning it, if it is determined that it does have to be paid for.

That really makes the whole thing subject to Federal procedural law by all four corners, in my opinion.

But I think the other way in which it is ancillary is almost equally persuasive—that the people in charge of policy in this

respect, in deciding whether to condemn, are going to be looking over the whole situation on a given stretch of shore to see whether available beaches are adequate, and again the very strong interest in saving public money is present; we do not want to have to pay for beaches in other places if this one really belongs to the public already. That is the question that might easily arise.

There again it seems to be that the subject is deeply affected with a Federal interest, and this presumption becomes on that branch of justification simply a means of vindicating in a manner Congress judges right the Federal interest in not spending public money when you do not need to.

Mr. ECKHARDT. I certainly do thank you, Professor Black. You have brought a great deal of information to this committee.

Next we have Terence L. O'Rourke, assistant attorney general of Texas.

STATEMENT OF TERENCE L. O'ROURKE, ASSISTANT ATTORNEY GENERAL FOR THE STATE OF TEXAS

Mr. O'ROURKE. My name is Terrence O'Rourke, assistant attorney general for the State of Texas. I come before this committee because the State of Texas is now litigating under the Texas Open Beaches Act, the very rights which this Federal legislation would intend to protect.

I will offer the committee a copy of this plaintiff's first amended petition in this case.

It may be of some benefit to the committee in seeing how important Federal legislation can be.

At the same time, for the State of Texas, Senator Schwartz was here before this committee yesterday and said without this bill that the public can only hope to win its right to use the beach in lawsuit after lawsuit, beach after beach, having to prove its right with particular rights time after time.

That is exactly what we are doing on West Beach in Galveston right now.

There are approximately 450 defendants in this case. The chairman well knows this since he is a party and a plaintiff in intervention in this case. The primary duty under the Texas Open Beaches Act is on the attorney general of the State to secure the public's rights.

I must say that the litigation, in a technical sense, is very difficult. Just the idea of serving 400 people, and if we win this case, I think that the attorney general of Texas will continue to go down to the beaches, all the way from Louisiana to Mexico, for establishing the public's right to use the beaches.

Mr. ECKHARDT. If I may interject for just a moment. If I understood the *Seaway* case, it dealt with—well, since you are virtually compelled to operate with respect to the defendant's employment, it did not even solve the 30 miles of Galveston beach, and——

Mr. O'ROURKE. That is correct.

Mr. ECKHARDT. You are now moving back in to introduce very much the same type of evidence that had to be introduced in the *Seaway* case.

Mr. O'ROURKE. I have a few technical suggestions to the committee regarding the bill now before you, which may be of some assistance.

On page 3, line 18, which is section 201 of the bill, it refers to the average elevation on the beach when the line of vegetation does not exist in a particular area. This is a very difficult thing to prove. I have had the Texas highway department and the county equipment engineer from Galveston County try to determine that line of vegetation where it would be when it is interrupted and the beach by its very nature changes on a daily basis, the winds and tides come in.

On the other hand, now with the use of aerial photographs which we have, it is fairly easy to see where the line of vegetation would be or should be, but for artificial or natural interruptions which can occur.

I would call your attention to the difficulty of the procedure which you put in section 201 of the bill and suggest that there might be a simpler way of doing that.

With regard to section 204 on standing, I am not here to argue that the Attorney General of the United States should have exclusive standing under this act. I think it might be desirable to include the attorneys general of the various States to establish and protect the right, but I see that you have that under section 207 and in other sections.

The attorney general of Texas has been and continues to be in favor of citizen standing or State standing under Federal legislation whenever it is possible. I know that the policy and the political difficulties of getting that through Congress may sometimes be great.

I am familiar with the floodgates of litigation argument that always arises when you try to increase the standing. These are mere suggestions.

If I did not state it clearly first, the State of Texas insofar as I represent them and the attorney general's office is so wholeheartedly in favor of the legislation which you have, it is an incredible piece of legislation, and so necessary. It not only would compliment the State act, it would be something that would be so much better and easier for the State of Texas with the same policy that it now has.

I want to point out an argument or difficulty under the Texas Open Beaches Act, which you are going to face in beach litigation that could arise if this bill were passed. That always gets down to the definition of where the beach is or what the beach is.

It is a part of the difficulty of using the concept of easement by prescription or the implied dedication upon which *Seaway* case, in essence, relied. These two concepts are very valuable when you have them.

As I mentioned earlier, it is a difficult burden proving this factually on the cases. And as the committee and the chairman well know, not every beach in Texas has the history of use that Galveston Island has. It has an importance not only because of historical use but because beaches do change.

The jury in the *Seaway* case found that the line of vegetation in Galveston Island had been virtually unchanged for 200 years. This case was decided about 10 years ago. If the case were retried on

the same issues, the conclusion could very well be different, now that the science of oceanography and ocean engineering, and what-not, and happenings to beaches is better known.

It appears that beaches do move, even the more stable beaches of the type we have in Texas. The difficulty of implied dedication or easement by prescription becomes important here because when you have net erosion or catastrophic changes in the beach front, your argument as to that single piece of property that you once claimed was the beach in one sense disappears.

We have a particular problem with the Weyman estate, as the chairman might know, where the defendants are claiming that the beach moved in 200 feet, and the Indians and Mexicans and Texas Rangers and stage coaches and fishermen never were on that part of the Weyman estate. They are arguing that implied dedication did not go to that part.

The argument of law which we will probably use in that case—I am not talking out of court here—but it is one for the court to establish, is that theory that may be called the rolling easement, that the beach is wherever you find it. Without that theory of law, you have actually no rights to the beach.

Just like in navigation, if you do not have the right to the Mississippi wherever it goes, you really have no right to navigation in the long-run sense. Based on the problems that I described, easement by prescription and implied dedication, I think it is important that this committee take the step that it does in inserting full consitutional authority that Congress may have to protect the beach.

In many, many cases the presumption of easement and dedication will not be there; in fact it will not be supported.

I wanted to respond on this constitutional problem which arises, but I think Professor Black—it is very difficult to argue with a Yale law professor, and I support the history entirely. Not only do I agree with the policy of the act that is now before the committee, but with the constitutionality. It is so clearly constitutional by various approaches, but that there may be another way which Congressman Dingell touched upon, in his colloquy with Mr. Kiechel, of the Lands Division of the Justice Department. I learned my constitutional law from Prof. Charles Wright, so I may have some perspective on how the executive views the power of Congress and the Government.

I point out that Mr. Kiechel said I do not see navigation in your act anywhere. Tactically my response is that there may be some way that you can beef up this. The technical advantage—well, there is a technical advantage under the navigation servitude that may be benefitted, and that is that what your bill would do would only guarantee the public's free and open access to the beaches, but it would also preserve the beaches.

In this act, the environmental aspect of preserving the beach is consistent with the public's interest in being able to use those beaches. There is abundant scientific evidence. I have a graduate degree in hydrology. I cannot give you all the details on it, but there is so much to show that barbed wire fences and concrete pilings and

cocktail lounges and condominiums and motels and horse stables and motorcycle stalls change the nature of the beach.

It may be sometime far in the future, the interest will extend behind those dunes. That is not what is here before you. To make this bill pass constitutional muster, it may be important and could be important, and I recommend to the committee that it take a look at the environmental aspects which are so important as they relate to navigation in that the United States would have an interest in maintaining the shoreline as it now exists.

After these barricades and private seawalls are constructed, in a very short time you can see and show beyond any doubt scientifically what happens when man alters that beach—well, what I am offering is that consistent with the environmental necessity that you may have for navigation, that you also have the interest of the public in using that very beach.

I would like to answer any questions I could on the litigation. I know that the chairman may have some.

Mr. ECKHARDT. Mr. O'Rourke, your testimony has been extremely helpful, particularly with respect to the specific suggestion. I am sure the committee would certainly welcome the suggestion with respect to that very thorny question of a precise delineation of the line where the dune line and the vegetation line do not meet on the earth at the point of highest wave, so to speak, and it may be that the real problem would be to say something final, say something with respect to what kind of line can be established for the purpose of some sort of preciseness as to what this beach covers.

It is extremely a difficult problem.

I think you put your finger on the hardest problem. Perhaps there would be some way of defining it in terms of interpreting aerial photographs you refer to, could be considerably easier than the definition, and of course there would be the possibility of delegating the designation of that line to some agency of government.

Mr. O'ROURKE. That may be a better approach, Mr. Chairman.

Mr. ECKHARDT. I would certainly like to have your attention devoted to that and your suggestions will certainly be considered and very much welcomed, particularly with your background, both in the law and in hydrology.

Mr. O'ROURKE. Let me add one thing that we have found about the vegetation line. While in the *Seaway* case held that the vegetation line was sufficient to be a property description and other things, and that may be or have been true of the beaches that existed in 1963 and for the prior 200 years, but the vegetation line does change with summer and winter, and it changes not dramatically.

It is a line for purpose of determining whether the public can use the beach, does not have to have the definiteness of a line for the purpose of determining where oil is produced. You do not have to have the bright line for royalty interests when you are talking about public use.

Mr. ECKHARDT. That is exactly the thing that occurred to me when the *Luttes* case was decided. I was then confronted with the problem of what can be done with respect to Galveston beaches, and in the case of the *Luttes* case, and it is the line which determines public use, the same which determines the line of possession.

If you will recall, I think Judge St. John Garwood in deciding the *Luttes* case said it really is not so important, what history really shows the line to be. The important thing is to define a line which determines that an oil well on one side of that line belongs to the State and on the other side of that line it belongs to the littoral owner.

I think he was making his decision as much as anything to meet the pragmatic question of a determination which could be finally and definitively established scientifically. I think he did well to do that.

On the other hand, the question of the use of the beach does not rest, if one considers it on pragmatic grounds, on a precise scientific determination which can be made over a long time by observers and scientists. It depends on what can be observed, what is written on the land, so that the man using the land can read the handwriting of nature at the time.

For that reason, it seems to me, it is quite practical to say, in the first place, that the line of ownership is the line established in the manner in which the *Luttes* case decided it, whereas the line of use is the line that is determined in the *Seaway* case.

Now that is, I think, essentially what our problem is. I think that also goes to your point about the rolling beach. I think this bill should include in a report reference to attitude of rolling easement. If there is any meaning to public use over long periods of time, that meaning is that character of the land had been traditionally used in a certain way and is therefore impressed wherever that character of land may be now with the right impressed upon it by dedication or by prescription.

There is a problem though in putting that in the bill. I think it might be better in the report, and that is a situation like this. Much of the New England beaches have eroded like portions of Galveston Island are eroding now. But the New England beaches have frequently had persons with property on those beaches for many years, perhaps 100 or 200 years.

Traditionally a wall would be built to protect the house from the sea behind the dunes. In the meantime, the entire sandy beach, both before shore and dry sandy beach has eroded away. What remains is a sea lapping at the wall.

Under this act as written, the littoral owner could protect himself by simply rebutting the presumption that the grant gave the public the right to go over his property. For instance, at this time the dunes may be on each side of the property, away from his house, but he can easily rebut the proposition that the grant did not include his house, because obviously he built his house behind the dunes.

He can also clearly rebut public prescriptive right over the land behind the wall.

It seems to me this is desirable, because it gives sufficient flexibility so we do not go in with a conceived and arbitrary law and say you have got to give up your home merely because the dunes have rolled behind your house now.

I agree with you entirely on the rolling concept of your prescription, but it seems to me, including our right to rebut a presumption, we must protect even these exceptional kinds of cases where justice

would be done, if some more arbitrary Federal inflexibility rule were established.

I invite your comment. I am afraid I just made a speech instead of asking a question, and for that I apologize.

Mr. O'ROURKE. I think that is a good way to setlet a case. I do no know if that is a good way to start out on one. For the purpose of getting this bill out of Congress, that may be the best approach also.

Mr. ECKHARDT. Mr. Potter.

Mr. POTTER. The bill before us provides certain additional authorties to the Secretary of Transportation, with respect to ancillary facilities. I am wondering if that goes far enough or whether on the other hand it would be desirable to provide more broad ability to assist and protect areas which are adjacent to and important to the beach, but which may not in fact be directly involved.

Mr. O'ROURKE. I want to respond to that with the utmost enthusiasm. Speaking on the environmental viewpoint, the history of the Netherlands in their battle against the sea, and in some places on the east coast which have been well documented, indicates that you cannot stop at the line of vegetation when you are truly interested in protecting the seashore for the use.

And that man affects—well, to the extent that the Department of Transportation would have the expertise of determining how people and vehicles will move within that region and police even the type of construction that should exist in that region, that in the long run in a truly national view of what has to be done that the Secretary of Transportation, possibly Interior, is going to have to get in on this.

Another aspect I want to point out about Texas, we have a case that may be broadened down in Texas where subsidence is important. You have the effect of beaches more seriously than any other place. One-foot drop in elevation means 30 feet or 40 feet intrusion by the sea. And things like that are very critical.

We may call the case the new Netherlands case because they already have dikes and pumps down there keeping the sea out. The fact that people build barriers—and I call them private sea walls around their house—may protect their house, but actually destroys the beach in that area.

The effects of man are terribly detrimental. In Texas one of the political realities about this lawsuit that we are engaged in is almost a concurrent duty of the attorney general in the sense that he can influence the legislature to do something more than just insure the public's right to the beach.

But like we all say now about development, that it has to be quality development or quality access. In fact, the beaches of Texas are terribly abused with motorcycles and dune buggies and horses, and it is really like a highway down there, unsafe for children.

So you do, if you are going to go so far as to guarantee public access to all of these beaches you are going to have to somehow establish a responsible police power to the extent to protect the very people that are going to be using that beach and the littoral owners who have an interest in having safety in their own use of the beach.

I may not have answered your question adequately on that.

Mr. POTTER. You have. If, upon reflection, you have some additional suggestions for language in the bill, we will be pleased to consider it.

Mr. O'ROURKE. Let me do that at another time. I have been to Cape Cod and seen a wonderful example of what the United States can do to preserve the beaches on that national seashore area, and I know that the Department of Transportation had some role in that of providing parking behind the dunes and the bridges over the dunes.

It is an example of public use and environmental safeguards in the best sense.

I know that is true in some other national seashore areas.

Mr. POTTER. That is all the questions I have, Mr. Chairman.

Mr. ECKHARDT. We certainly do thank you, Mr. O'Rourke.

The committee will now stand adjourned until 2.

[Whereupon at 1 p.m. the committee was recessed to reconvene at 2 p.m. the same day.]

AFTERNOON SESSION

Mr. ECKHARDT. The meeting of the subcommittee will be in order.

Mrs. Sarah Emmott, who is representing here the Houston Sportsmen's Club of Texas and the Texas Conservation Council, will be our next witness. We are very delighted to have you, Mrs. Emmott.

STATEMENT OF SARAH EMMOTT, REPRESENTING HOUSTON SPORTSMEN'S CLUB AND THE TEXAS CONSERVATION COUNCIL

Mrs. EMMOTT. Congressman Eckhardt, distinguished legislators, ladies and gentlemen: I am Sarah Emmott of Houston, Tex., and I am representing the Houston Sportsmen's Club. We have around 4,500 members over the State, but the membership is predominantly made up of persons in the Houston area.

I am representing them, but I would like to feel I am also speaking for people everywhere who cannot speak for themselves, who make up the inarticulate public; the hundreds of thousands of salt-water fishermen; the multiplied thousands of bathers, tourists, campers, vacationers, picnickers; the children—especially the children—and generations of people yet unborn; all people everywhere who love the seashore but do not realize how little of it is still available for public use, or who realize this scarcity far too well but feel helpless to personally do anything about it.

Already more than half of the Nation's population lives within 50 miles of the coasts of the Atlantic and Pacific Oceans, the Gulf of Mexico, and the Great Lakes. It is estimated that by the year 2000, 80 percent of our population may live in that same area. This means that passage of H.R. 10394 will ultimately make seashore recreation easily available to 80 percent of our population.

Texas became the first State to guarantee by law the public's right to use its beaches. The test case was won for the public and upheld by the State supreme court, but violations continued. In front of developments, large areas of beach were barricaded and marked "private—for lot owners only" until further legislation and the courts forced the removal of both barricades and signs.

The open beaches law gave the public the right to use the beach to the vegetation line, so developers covered huge areas of beach parallel to the vegetation line with bulkheads, which when filled and seeded would produce a new vegetation line as well as the necessity for new suits against the violators.

Unfortunately the Texas attorney general at that time was not anxious to file suit against the developers, and the pleas of individuals and organizations fell on deaf ears. Finally, at the request of the Galveston district attorney, in June 1969, two assistant attorneys general were sent to study alleged violations on Galveston's West Beach. Their report indicated that there were indeed violations, but it was an entire year before the attorney general filed suit. Time dragged on as more bulkheads were built and those already in place were enlarged. Finally in December 1971, the case was set for April 1972, but by that time the developers were embroiled in the Sharpstown scandal and had declared bankruptcy. The clerk in bankruptcy ruled that the trial could not proceed until the bankruptcy claims were settled. The case is supposed to come to trial on the 29th of this month—4 years and 4 months after the attorney general's office admitted that the law was being violated. I understand it has been postponed again. However, it is not the present attorney general's fault this time. Fortunately we now have a new attorney general, but it seems obvious that having a law is not enough if those whose duty it is to enforce it do not do so. A national law protecting the public's right to use the beaches hopefully will be enforced more fairly and will eliminate the necessity of trying case after case on beach after beach.

We feel that Texas needs the national open beaches law you are considering and certainly the rest of the country needs it.

Some of the gentlemen testifying previously felt that a national law is not needed, that the States should pass their own laws. But we think that it is needed.

Beaches in some of the coastal States have been lost to public use gradually, bit by bit, with those who cared about them feeling helpless to do anything, but Texas was singularly fortunate in this respect. Her beaches had always been free and open and when fences started going up, the action was sudden and dramatic, which focused the public's attention on the problem. We had a legislator who really had the public's interest at heart. We had a few individuals willing to donate all their time for a number of months publicizing the problem and working for the legislation. And we had a friendly press, particularly one newspaper. Luckily we had all these items at the right time. If any one of them had been missing, the bill might not have passed.

Many of the other coastal States do not have this combination of circumstances, and they will probably have a difficult time passing beach legislation or may find it impossible to do so.

Having helped work for passage of the Texas law, we are familiar with some of the difficulties encountered, particularly the strength of private interests and the lack of funds and eloquence that weaken the public's defense.

Another point should be made. Providing public beaches where there are none now will enhance land values even a considerable

distance away from those beaches. Congressman Eckhardt has said that some of the developers on West Galveston Island who originally opposed his open beaches bill, later told him it enabled them to sell property farther back on the island that previously no one had wanted. Public beaches will also stimulate the tourist industry and improve local economies.

It is a sad commentary on our priorities that so small a proportion of the recreational shoreline of the United States is presently available for public use. We agree with all that has been said at this hearing about the inspirational and esthetic values of the seashore. Never have our people needed these values more than now and we urge passage of H.R. 10394.

Mr. ECKHARDT. Mr. de la Garza?

Mr. DE LA GARZA. Mr. Chairman, I would just like to commend Mrs. Emmott for her effort for so many years in public endeavors of the people, and I appreciate her being here today and bringing us this very constructive statement in behalf of this legislation.

Mrs. EMMOTT. Thank you. Anella Dexter of Houston, Tex., had planned to be here, but unfortunately she could not come and she asked me to present her paper. So, with your permission, I would like to summarize it.

Mr. ECKHARDT. Surely. You may proceed with that.

Mrs. EMMOTT. She is representing the Texas Conservation Council, which is a statewide nonprofit organization, dedicated to the establishment of parks and recreation areas, the preservation of natural areas, and the protection of native wildlife.

The council is particularly interested in the passage of a good national open beach law, because protection of open beaches in Texas was the reason we organized. We did so in 1958 when an expected decision in the *Lutt's* case changed the boundary between public and private land to the mean higher high tide line instead of the vegetation line, and adjoining property owners began fencing the beaches.

In the beginning there were only 10 of us, just ordinary citizens with no money or experience in the legislative matters. But we did have Armand Yramategui to lead our efforts. This great young man was later senselessly murdered in a highway robbery, but he personally deserves much of the credit for passage of the Texas law. We are glad he was still alive when the council received an American Motors Conservation Award for its work for the passage of the Texas open beaches law and the establishment of Padre Island National Seashore.

Mrs. Dexter continues by describing the conditions along the Atlantic Seaboard, and compares the Oregon and Texas laws. She says the Texas law is the more complicated and is still causing problems which require court action. According to this law, the landward limit of the public easement is 200 feet above the mean low tide mark, "unless prescriptive rights can be established to the vegetation line."

Because of pressures from private owners of beach properties and resort developers, Texas open beaches law could not have been passed without this provision. Several years ago some of the resort developers on Galveston's West Beach built bulkheads approximately at the 200-foot line above mean low tide and filled in behind them, thereby changing the vegetation line. The State attorney general

did nothing to stop them. Now it is up to a new attorney general to convince the courts that these bulkheads should be removed. We believe all of this could have been avoided if the State's open beaches law had been based on the use of the beaches "as a common" instead of requiring proof of prescriptive rights for each small strip of beach.

Our Nation's early history shows that our beaches were used as a common.

We think H.R. 10394 is very well written. It gives due consideration to possible exceptions to beach use as a common by excluding any beaches where a littoral owner "is protected absolutely by the Constitution." It also recognizes the necessity for using some beaches for navigation and industry while keeping as many beaches as possible in as natural a condition as possible for the use and enjoyment of the public.

It would certainly simplify matters if the only evidence needed to open a beach to public use was proof that the area "is a beach" and therefore has imposed upon it "a prescriptive right to use it as a common." We like the definition of the beach as the area along the shore of the sea that is affected by wave action directly from the open sea. The special case of a sandy or shell beach is also well defined. In a case where there is no vegetation line whatever, the provision that the landward boundary of the beach shall be 200 feet above mean high tide is much better than using a line based on the mean low tide because it is more easily identified than the mean low tide line, which is generally somewhere out in the water.

Of course it would still have to be accurately determined for legal considerations. Also, 200 feet above the mean high tide line provides a usable beach, while a line only 200 feet above mean low tide does not. There are times when high tides, not necessarily storm tides, cause Texas beaches to be awash up to this 200-foot line above mean low tide. Perhaps there are cases where the public has used the beach more than 200 feet above the mean high tide. Would it be wise to state that this provision shall have no effect in reducing a beach or would this just open another Pandora's box of troubles?

We wonder too about the Federal-State partnership described in section 207 as it applies to sections 204 and 206. In section 204 we assume the State is a partner in deciding where beach access is to be acquired, we wonder if this should be clarified. Section 206 states that ownership and control shall be vested in the States. Does this fully protect the Nation's interest in Federal wildlife refuges that have a sea beach? The bill provides that the State shall have control of seashore areas 'for the use of the public." Suppose the Aransas Wildlife Refuge were on the gulf instead of the bay, would it be fully protected against adverse public use?

It is wonderful that Representatives from so many coastal States are cosponsoring this bill. Some of the States they represent have attempted to pass open beach bills and may even have passed such bills this year. Some States like Florida recognize prescriptive rights to beach areas; others like California do not. Washington claims ownership of the entire beach to the vegetation line, while some States recognize the low tide line as the boundary between private and public property. It is very confusing. We hope H.R.

10394 will pass and give every coastal State the incentive to reclaim its beaches for public use.

Mr. ECKHARDT. Mr. Potter, do you have any questions for Mrs. Emmott?

Mr. POTTER. No.

Mr. ECKHARDT. Mrs. Emmott, I just want to say that one of the most encouraging things to committees like this is to see persons like yourself, with no personal interest but just an interest in the public welfare, spend your time and effort in a program of this nature. And I know that this is not the first time. You are not just coming here to speak for an organization. But I know you and Mrs. Dexter to probably be the most knowledgeable people from actual, on the site observation of the problem here of anyone whom I know.

I was also very pleased to hear you mention Armand Yramategui who I think was more than any other single person responsible for mustering the support that made the Texas open beaches bill a reality. And it gives me special pleasure to recognize you here today.

Mrs. EMMOTT. Thank you.

Mr. ECKHARDT. Thank you so much for your testimony.

Mrs. EMMOTT. Thank you.

[Prepared statement follows:]

STATEMENT OF SARAH EMMOTT, HOUSTON SPORTSMEN'S CLUB

Congressman Eckhardt, distinguished legislators, ladies and gentlemen: I am Sarah Emmott of Houston, Texas and I am representing the Houston Sportsmen's Club. We have around 4500 members over the state but the membership is predominantly made up of persons in the Houston area. I am representing them but I'd like to feel I'm also speaking for people everywhere who make up the inarticulate public: the hundreds of thousands of salt water fishermen; the multiplied thousands of bathers, tourists, campers, vacationers, picnickers; the children—especially the children—and generations of people yet unborn; all people everywhere who love the seashore but do not realize how little of it is still available for public use, or who realize this scarcity far too well but feel helpless to personally do anything about it.

According to James A. Noone (12-9-72 National Journal), "The United States shoreline consists of 88,600 miles bordering on the Atlantic, Pacific, and Arctic Oceans and 11,000 miles on the Great Lakes. It is estimated that 53 percent of the nation's population—some 160,000,000 persons live within 50 miles of the coasts of the Atlantic and Pacific Oceans, the Gulf of Mexico and the Great Lakes. Some estimates project that by the year 2000, 80 percent of our population may live in that same area, perhaps 225,000,000 people."

One of the reports presented to the House of Representatives when it was considering the Coastal Zone Management Act of 1972 (H. Rept. 92-1049 on H.R. 14146) presented a graphic picture of what is happening in many coastal areas: "Large metropolitan areas with their suburban sprawl have blotted out great stretches of the shoreline. Heavy industrial complexes and their supporting industries have entered the zone, lured by available land, labor, and water supplies. An affluent society has descended in large numbers to enjoy the recreation available in the costal waters and the relaxation available on the coastal beaches. Housing developments in many places have covered the landscape in what were once remote, relatively inaccessible areas, and massive land-fill operations have covered valuable areas of the esturine marsh lands."

The 1969 Report of the Commission on Marine Science, Engineering, and Resources entitled, "Our Nation and the Sea" states (page 70) that the shoreline is "a resource that belongs to all of the people" and "recommends that provision for public recreation and public access to the water in urban areas be included in the planning of large-scale industrial projects, new beach shoreline, and transport facilities. Furthermore, Federal funding and grants-in-aid should

be conditioned upon provision of such public recreation and access as well as maintenance of water quality."

In Texas the beaches had always been open and free for the use of all until a 1958 Supreme Court decision rudely changed the picture. In the famous case, J. W. Luttes vs the State of Texas, the court set the boundary between public and private land at the mean high tide line instead of the vegetation line as it had always been thought to be. Overnight fences were erected across the beaches. They extended from beyond the vegetation line to far out into the water, and suddenly thousands of persons saw one of their favorite recreations drastically curtailed. If there had been no move to counteract this trend I shudder to think how few Texas beaches would be available for public use today.

Fortunately Congressman Eckhardt was then Texas Representative Eckhardt and he introduced the Texas Open Beaches Bill. Gentlemen, if you wonder whether people really care about beaches ask Mr. Eckhardt. I understand he got more mail on that bill than had ever been received on any previous piece of legislation to come before the Texas Legislature.

The bill was passed and Texas became the first state to guarantee by law the public's right to use its beaches. The test case was won for the public and upheld by the state supreme court, but violations continued. In front of developments, large areas of beach were barricaded and marked "private—for lot owners only" until further legislation and the courts forced the removal of both barricades and signs. The Open Beaches Law gave the public the right to use the beach to the vegetation line, so developers covered huge areas of beach parallel to the vegetation line with bulkheads, which when filled and seeded would produce a new vegetation line as well as the necessity for new suits against the violators.

Unfortunately the Texas Attorney General at that time was not anxious to file suit against the developers and the pleas of individuals and organizations fell on deaf ears. Finally, at the request of Galveston District Attorney, Jules V. Damiani, Jr., in June 1969 two assistants were sent to study alleged violations on Galveston's West Beach. Their report indicated that there were indeed violations but it was not until June 30, 1970 that the Attorney General filed suit. Time dragged on as more bulkheads were built and those already in place were enlarged. Finally, on December 2, 1971 the case was set for April 1972, but by that time the developers were embroiled in the Sharpstown Scandal and had declared bankruptcy. The clerk in bankruptcy ruled that the trial could not proceed until the bankruptcy claims were settled. The case is finally coming to trial on the 29th of this month—4 years and 4 months after the attorney general's office agreed that the law was being violated. Fortunately we now have a new attorney general but it seems obvious that having a law is not enough if those whose duty it is to enforce it do not do so. A national law protecting the public's right to use the beaches will hopefully be enforced more fairly. We feel that Texas *needs* the National Open Beaches Law you are considering and certainly the rest of the country needs this law.

Beaches in some of the coastal states have been lost to public use gradually, bit by bit, with those who cared about them feeling helpless to do anything, but Texas was singularly lucky in this respect:

"(1) Her beaches had always been free and open and when fences started going up the action was sudden and dramatic, which focused the public's attention on the problem.

"(2) We had a legislator who really had the public's interest at heart.

"(3) We had a few individuals willing to donate all their time for a number of months publicizing the problem and working for the legislation.

"(4) We had a friendly press, particularly one newspaper (The Houston Press)."

Luckily we had all these items at the right time. If any one of them had been missing the bill might not have passed. Most of the other coastal states have been less fortunate.

Another point should be made. Providing public beaches where there are none now will enhance land values even a considerable distance away from those beaches. Congressman Eckhardt had said that some of the developers on West Galveston Island who originally opposed his Open Beaches Bill, later told him it enabled them to sell property farther back on the island that previously no one had wanted. Public beaches will also stimulate the tourist industry and improve local economies.

Beaches provide far more than fun and recreation. The area where land meets the sea is fascinating in its constantly changing patterns of cloud and water and its myriad forms of life. The ocean's immensity is always a source of inspiration and one finds solace there in time of grief or trouble. The great naturalist, Henry Beston, writing in "Outermost House," said, "Nature is a part of our humanity, and without some awareness and experience of that divine mystery man ceases to be man." He described the seashore as, "a world whose greater manifestations remain above and beyond the violence of men. Whatever comes to pass in our human world, there is no shadow of us cast upon the rising of the sun, no pause in the flowing of the winds or halt in the long rythms of the breakers hastening ashore."

It is a sad commentary on our priorities that only 6 percent of the recreational shoreline of the United States is presently available for public use. Next year it will be even less. You are in the enviable position of being able to change that percentage, and to clearly establish for our citizens the right to free and unrestricted use of the beaches of America.

Mr. ECKHARDT. At this point the record will be kept open for certain additional documentation and correspondence. I might say that we have here, at least for the file of the committee, all of the land grants in the State of Texas that verge on the open sea, that is, the Gulf of Mexico, and there is prepared for the use of the committee excerpts from the land titles on the Texas coast that indicate the method in which these lands are described.

Since the problem here is a complex question, both factually and legally, I think it is particularly important that the record be kept open in these respects. We may desire to obtain similar information with respect to other beaches.

The record will also include the statements of various witnesses who have asked that their testimony be included in the record in writing, including the National Wildlife Federation, Mr. Joel Pickelner's testimony, the National Audubon Society, Cynthia E. Wilson's testimony, and we will also hold the record open for certain correspondence that is forthcoming from various Governors of the States that are concerned with the legislation here.

Therefore this meeting is now adjourned, with the understanding that the total hearing is not closed until the record is made complete.

[The following material was submitted for the record:]

STATEMENT OF CYNTHIA E. WILSON, WASHINGTON REPRESENTATIVE, NATIONAL AUDUBON SOCIETY

Mr. Chairman and Members of the Subcommittee: I am Cynthia E. Wilson, Washington Representative of the National Audubon Society. We appreciate the opportunity to comment on H.R. 10395.

We sympathize with the general intent of this bill, which as we understand it is to prevent commercial or other property owners from denying the public access to the nation's beaches, and we share your concern about the spreading practice of walling out the public from the seashore. However, we have a number of serious questions about the bill as written.

It may be that we simply do not understand the bill, and if that is so we suspect there will be a good many other people who also will be confused by it and fail to see how it will actually function.

One important question we have concerns the definition of beach. Although the bill's definition is very long and specific, we are uncertain whether the term beach as used includes only the outer perimeter, so to speak, of the coast, or whether it also includes bays and sounds. As you know, along much of our coast there are barrier islands, such as Assateague, the Outer Banks, and Padre Island. Behind these islands on the mainland there are marshes—although these are rapidly being drained and filled. We assume that as defined "beach" means the seaward side of these islands but does not include the actual mainland, since it is the island which is "affected by wave action

directly from the open sea." But we are uncertain whether sounds, i.e. Long Island Sound, or bays or portions of bays would fall under this definition. We suggest that this be clarified, or else it could give rise to potential litigation.

As we read the bill, it would appear that anyone—whether a private citizen, an organization such as National Audubon, or possibly even the federal government—would be prohibited from restricting access to a beach. Since the bill does not define "person" we are uncertain who is covered by Sec. 203. Further, the sweeping statement in Section 202, that "the public shall have free and unrestricted right to use them as a common to the full extent that such public right may be extended consistent with such property rights of littoral landowners as may be protected absolutely by the Constitution" is downright confusing.

Section 206 gives the States authority to enact "reasonable zones for wildlife, marine and estuarine protection," and we certainly think such authority is necessary. In terms of wildlife protection, it would be necessary to set aside some areas for colonial nesting seabirds and other birds which nest on beaches, or they will be wiped out.

This brings me to a question of direct concern to the Audubon Society. Could we protect our own sanctuaries from human intrusion under the terms of this bill?

The Society owns some 43 sanctuaries, many of them along the coasts, including several in Texas. The purpose of these sanctuaries is to protect nesting or other critical habitat for wildlife, primarily non-game birds. Most of our sanctuaries are not routinely open to the public since heavy visitation would disturb the wildlife and destroy the habitat. In addition, we simply cannot afford to maintain the large staff required to manage visitors. Some of our sanctuaries, such as Corkscrew Swamp in Florida, are open to the public, but it would be impractical to do this in most of them. We believe that by protecting the habitat of rare species of wildlife, we are performing a public service, and indeed these sanctuaries are paid for by contributions from the public.

Depending upon the definition of beach, I am not sure how many of them would fall under the purview of this bill, since many are on bays, but one of our properties would definitely fit the definition of beach. Several years ago, the Schlitz Foundation gave us a 185-acre tract on the shore of Lake Michigan just outside Milwaukee—that is, an outdoor educational facility—and a sanctuary. It will be open to the public, but we need to control public access from the lakefront, particularly off road vehicles, but it appears that we would have difficulty in doing so under this bill.

A parallel concern is the effect, if any, of this legislation on the many national wildlife refuges and national seashores along our coasts. Controlling offroad vehicles on them has become a severe problem in some areas, and in our viewpoint the Interior Department has sometimes been too lenient in permitting them to be used. When the government has tried to restrict them, the resulting political pressures from developers and dune buggy enthusiasts has on occasion caused the government to back down.

A good example of this problem of too much public access is Back Bay National Wildlife Refuge on the Virginia coast just a few miles north of the North Carolina line. When the refuge began to be severely impacted by vehicles, the Department tried to close the beach to vehicular use. Political pressure made the Department back down, and the damage grew more intense. Finally after considerable pressure from environmentalists, Interior again announced restrictions on access by vehicle. Developers who have been peddling beachfront lots south of the refuge then went to court and have again delayed the regulations. We are an intervenor on Interior's side in this important case, and we are keeping our fingers crossed that the agency will stand firm.

If the Committee reports this bill, we hope you will make it clear that its intent is not to curtail protective restrictions to preserve he resources, i.e. the beach and related wildlife and plant communities, which have been placed on use of the beach.

We are aware, as I am sure the Committee is, that the public is sometimes its own worst enemy when it comes to natural resources, and it is vital that reasonable regulations to protect environmental values for future generations are kept in force. As I said at the beginning of this statement, we support the basic idea of this bill—public access to the beaches—and we would welcome clarification of the questions we have raised.

Thank you for this opportunity to present our views.

Statement of Joel M. Pickelner on Behalf of the National Wildlife Federation

Mr. Chairman, I am Joel M. Pickelner. Conservation Counsel of the National Wildlife Federation which has national headquarters at 1412 Sixteenth Street, N.W. here in Washington, D.C.

Ours is a private organization which seeks to attain conservation goals through educational means. The Federation has independent affiliates in all 50 States, Puerto Rico, Guam and the Virgin Islands. These affiliates, in turn, are composed of local groups and individuals who, when combined with associate members and other supporters of the National Wildlife Federation, number an estimated 3½ million persons.

We welcome the invitation to appear today to comment on H.R. 10394, a bill to establish a national policy with respect to the Nation's beach resources.

As can be seen from the attached resolutions, the National Wildlife Federation has long been interested in preserving and making available to the general public the Nation's beach resources. Subsequently, we support the concepts expressed in H.R. 10394.

Probably the most popular form of outdoor recreation in this country today involves the use of the Nation's beaches and coastlines. Unfortunately, present beach and coastline facilities are being taxed beyond their capacity in many areas of the Nation. For this reason we are particularly pleased with Section 202 of H.R. 10394, which reaffirms the common law principle that the beaches belong to everyone.

While we fully support the principle of open beaches and commend the sponsors of H.R. 10394 for bringing this issue before the House of Representatives, we feel that H.R. 10394 could use some tightening up, particularly in the area of protecting the ecological values of beaches and wetlands. The Nation's wetlands and coastal areas are among the most important wildlife production areas. When we talk about increased or unlimited public access we must give strong consideration to protecting these values by balancing the public and environmental needs.

The obvious purpose of this legislation is to put a halt to the practices of land developers and others who have been denying access to the Nation's beaches to the public at large. At the present time the public demand for beaches far outweighs the public beach capacity. However, in seeking to right this inequity we must be careful not to damage many of the values which make the beaches the attraction they are. For instance, what limitations are there to public access? Does that mean that I can take a dune buggy on any beach in the country? Is there any way that numbers can be limited or must everyone who comes be accommodated? We feel that these and other questions should be thoroughly looked at before this legislation is reported.

There should be some provision for inventorying the beaches and wetlands to determine which are suitable for recreational use and what the best recreational use would be. For instance, some beaches are best used for swimming and sunbathing, others are good for hunting and fishing, still others should be maintained as wildlife preserves.

While most of the Nation's beaches are off-limits to the public because of restricted access, many are not usable because of industrialization and the resulting pollution. There are numerous beaches near large metropolitan areas which could be rehabilitated for public use. Vigorous programs to abate pollution or to cordon off recreation areas from polluted waters could offer a means to recover usable beaches near large cities where they are most needed.

Before concluding, Mr. Chairman, I would hope that an effort could be made to tie in this legislation with the Coastal Zone Management Act and with pending Land Use legislation. The passage of the Coastal Zone Act and the pending passage of the land use legislation are two important steps toward stemming the runaway growth along our Nation's shorelines.

Finally, Mr. Chairman, along with my statement I would like to submit three resolutions passed by the National Wildlife Federation which support open beaches. We continue to feel that the right of the public to use the Nation's beaches should be aggressively asserted through acquisition of public access to beach property.

Thank you for this opportunity to express our views.

NATIONAL WILDLIFE FEDERATION—30TH ANNUAL CONVENTION, PITTSBURGH, PA., MAR. 11–13, 1966

RESOLUTION NO. 20—PUBLIC ACCESS TO TIDAL WATERS

Whereas increasing numbers of salt water sportsmen are finding public access areas to tidal waters inadequate; and

Whereas the public accesses to coastal areas are dwindling in numbers and additional accesses must be acquired before the costs become prohibitive for public governmental agencies; and

Whereas an acquisition program should be launched on an emergency, accelerated basis to insure public access to these resources for future generations: Now, therefore be it

Resolved, That the National Wildlife Federation, in annual convention assembled March 12, 1966, at Pittsburgh, Pa., asserts its conviction that a nationwide plan for providing public access to recreational waters should be developed and hereby pledges its cooperation in bringing this need to the attention of proper Federal and State agencies concerned and the general public.

NATIONAL WILDLIFE FEDERATION—24TH ANNUAL CONVENTION, DALLAS, TEX., MAR. 4–6, 1960

RESOLUTION NO. 11 —SHORELINE RECREATION AREAS

Whereas shoreline areas bordering such water areas as the Atlantic and Pacific oceans, the Gulf of Mexico, Great Lakes and many river systems offer invaluable recreational opportunities; and

Whereas suitable shoreline recreational locations are fast dwindling in number due to private development, including industrial; and

Whereas out-door recreational needs are continually mounting as the population increases: Now, therefore be it

Resolved, That the National Wildlife Federation endorses the principle of establishing National Shoreline Recreation areas for public use and petitions the 86th Congress to give early consideration to establishing such areas at Padre Island in Texas, Cape Cod in Massachusetts, in the Oregon Dunes of Oregon, Point Reyes in California and in other suitable places: be it further

Resolved, That legislation establishing such areas and regulations promulgated concerning them by the administering departments should recognize and provide for public hunting and fishing where feasible, and in cooperation with the state game and fish agency, as one of the appropriate forms of recreation.

NATIONAL WILDLIFE FEDERATION—27TH ANNUAL CONVENTION, DETROIT, MICH., MAR. 1–3, 1963

RESOLUTION NO. 12—PRESERVATION OF SHORELINE AREAS

Whereas the immediate preservation of suitable shoreline areas is viewed as necessar yfor a program of varied public outdoor recreational opportunities; and

Whereas the acquisition of such suitable shoreline areas can be assured only through coordinated and cooperative long-range planning; and

Whereas to be most beneficial such areas should be situated near large population centers and thus are the subject of many competing demands; and

Whereas the need for shoreline preservation is acute: Now, therefore be it

Resolved, That the National Wildlife Federation in annual convention assembled March 3, 1963, at Detroit, Mich., hereby urges the U.S. Department of the Interior to assume a vigorous leadership in the preservation of shoreline recreation areas for public use and that immediate attention be directed to establishment, either by the Federal Government solely or in cooperation with appropriate state agencies, of these proposed areas: Fire Island on the south shore of Long Island, N.Y.; Assateague Island, Maryland and Virginia; the extension of Cape Hatteras National Seashore, North Carolina; Channel Islands, California; the Oregon Dunes, Oregon; Sleeping Bear Dunes, Michigan; and Pictured Rocks, Michigan.

STATEMENT OF ANELLA DEXTER, TEXAS CONSERVATION COUNCIL, INC.

I am Anella Dexter of Houston, Texas. I represent the Texas Conservation Council, which is a state-wide, non-profit organization dedicated to the establishment of parks and recreation areas, the preservation of natural areas and the protection of native wildlife.

We are particularly interested in the passage of a good national open beach law because the protection of open beaches in Texas was our first project—our "excuse for being." When we realized early in 1958 that a pending State Supreme Court decision could establish the mean higher high tide level as the dividing line between state and private property and deprive the public of its time-honored right to use the beaches, we decided to do something about it. There were only ten of us, we had no money, and the people as a whole would not believe what we were telling them until the fences went up. We called ourselves "Texas Beaches Unlimited" and went to work to try to get the legislature to take action. When Bob Eckhardt, then a State Representative, introduced his Open Beach bill, we solicited help from the newspapers, the radio, and the public. We were later told that the legislators received more letters in support of this bill than they had ever received on any previous legislation. At one time we were practically convinced that the bill could not pass because of strenuous opposition from beach property owners and especially resort developers, but because of Mr. Eckhardt's persistence and persuasiveness it became law. At this point we organized as the Texas Conservation Council so that we could work for a national park on Padre Island and for other conservation projects.

In the test case that followed two of our board members did reference reading for the Attorney General's office and helped to find witnesses who could testify to long time use of Texas beaches. The State won its case on all counts, the Council received an American Motors Corporation's National Group Award, and the two Council members who helped on the court cases were made Honorary Assistant Attorneys General of Texas. Our biggest satisfaction, however, was seeing the fences come down and the people enjoying the beaches once more.

When we think about what we came so close to losing and what some states have never had, we wish we could do more than just urge that you Congressmen pass a National Open Beach bill. A day at the seashore is a memorable experience yet there are thousands upon thousands of people in our coastal states, especially along the Atlantic seaboard, who live near the coast but never get to see the ocean because most of the seashore is privately owned and "off-limits" to the public. In New Jersey, for example, there are two famous seashore resort and convention centers that play host to millions of tourists each year and there probably are some other city parks along the seashore but so far as we know there is only a ten-mile strip of public beach for people who prefer a less commercial atmosphere.

In Rhode Island a few years ago, a visit to the seashore meant driving to a private parking lot, taking a beach umbrella from the car, walking a short distance to the beach and sticking it into the sand to claim the territory under it. The beach was narrow and the umbrellas nearly touched each other. In all the nation, we are told, only 5 or 6 per cent of its beach areas are available for public use. It is this sort of situation that calls for an open beach law.

Oregon is the only state other than Texas that has had such a law for any length of time. As in Texas, the law was the result of emergency action. Here too, the people had always been able to enjoy their beaches but a few years ago a resort owner fenced the dry sand area on Cannon Beach. The people were furious, the Governor immediately declared it a recreation area and in 1969 the legislature passed an open beach law. Unlike the Texas law, it is based on the legal doctrine of customs rather than prescriptive rights. It also differs from the Texas law in its definition of a beach. It states that the public easement shall extend to the 16 foot contour except in low areas such as marshes and estuaries where it extends to the 5' 7'' contour. A unanimous decision by the State Supreme Court states that all dry sand areas on the ocean front including those in private ownership are reserved for public use in perpetuity.

The Texas law is more complicated and is still causing problems which require court action. According to this law, the landward limit of the public

easement is 200 feet above the mean low tide mark "*unless* prescriptive rights can be established *to the vegetation line.*" Because of pressures from private owners of beach properties and resort developers, Texas Open Beach law could not have been passed without this provision. Several years ago some of the resort developers on Galveston's West Beach built bulkheads approximately at the 200 foot line above mean low tide and filled in behind them, thereby changing the vegetation line. The State's Attorney General did nothing to stop them. Now it is up to a new Attorney General to convince the courts that these bulkheads should be removed. We believe all of this could have been avoided if the State's Open Beach law had been based on the use of the beaches "as a common" instead of requiring proof of prescriptive rights for each small strip of beach.

Although the idea of beach protection for public use "as a common" is not a statute in Britain, the declarations of the judges in various court cases have strengthened it to where it is as strong as any statute. We cerainly like his approach to opening our nation's beaches. It is a part of our British heritage and also of the Spanish heritage of our southern states where early law was based on the ancient laws of the Partidas and the Royal Order of 1815, which gave fishermen the undisputed right to use the beaches for shelter and for drying their nets, etc. Our nation's early history shows that our beaches were used as a common.

We think H.R. 10894 is very well written. It gives due consideration to possible exceptions to beach use as a common by excluding any beaches where a littoral owner "is protected absolutely by the Constitution." It also recognizes the necessity for using some beaches for navigation and industry while keeping as many beaches as possible in as natural a condition as possible for the use and enjoyment of the public.

It would certainly simplify matters if the only evilence needed to open a beach to public use was proof that the area "is a beach" and therefore has imposed upon it "a prescriptive right to use it as a common." We like the definition of a beach as the area along the shore of the sea that is affected by wave action directly from the open sea. The special case of a sandy or shell beach is also well defined. In a case wherethere is no vegetation line whatever, the provision that the landward boundary of the beach shall be 200 feet above mean high tide is much better than using a line based on the mean low tide line, which is generally somewhere out in the water. Of course it would still have to be accurately determined for legal considerations. Also, 200 feet above the mean high tide line provides a usable beach while a line only 200 feet above mean low tide does not. There are times when high tides, not necessarily storm tides, cause Texas beaches to be awash up to this 200 foot line above mean low tide. Perhaps there are cases where the public has used the beach more than 200 feet above the mean high tide. Would it be wise to state that this provision shall have no effect in reducing a beach or would this just open another Pandora's box of troubles?

We wonder too about the Federal-State partnership described in Section 207 as it applies to Sections 204 and 206. In Section 204 we assume the state is a partner in deciding where beach access is to be acquired, we wonder if this should be clarified. Section 206 states that ownership and control shall be vested in the states. Does this fully protect the Nation's interest in Federal Wildlife Refuges that have a sea beach? The bill provides that the state shall have control of sea shore areas "for the use of the public." Suppose the Aransas Wildlife Refuge were on the Gulf instead of the bay, would it be fully protected against adverse public use?

It is wonderful that representatives from so many coastal states are co-sponsoring this bill. Some of the states they represent have attempted to pass open beach bills and may even have passed such bills this year. Some states like Florida recognize prescriptive rights to beach areas; others like California do not. Washington claims state ownership of the entire beach to the vegetation line while some states recognize the low tide line as the boundary between private and public property. It's very confusing. We hope H.R. 10394 will pass and give every coastal state the incentive to reclaim its beaches for public use.

MEMO

From: Jim Wilcox.
To: Frank Potter.
Re: Constitutionality of the Open Beach bill.
Date: January 20, 1974.

Issue: Whether H.R. 10394, the Open Beach bill introduced by Congressman Eckhardt, will be constitutional if enacted into law?
Conclusion: Yes.

In October 1973 hearings on the bill before the House subcommittee on Fisheries and Wildlife Conservation and the Environment, Professor Black of the Yale Law School affirmatively answered the above question. The following is primarily an elaboration of Professor Black's testimony.

Subissues:

1. Does the Congress have an adequate basis in the Constitution for asserting a federal interest in public access to beaches?

2. In the general means of implementing the interest, that of creating subject matter jurisdiction in the federal courts, constitutionally sound?

3. Is the presumption of public access to beaches a second constitutionally valid means of implementing applicable federal interests, and is it a violation of littoral owners' due process rights?

I. DOES THE CONGRESS HAVE AN ADEQUATE BASIS IN THE CONSTITUTION FOR ASSERTING A FEDERAL INTEREST IN PUBLIC ACCESS TO BEACHES

A. The commerce clause

Under Article 1, Section 8 of the Constitution, the Congress is authorized "(t)o regulate commerce with foreign Nations, and among the several States." "Commerce" for purposes of that clause is "one of the broadest concepts known to American constitutional law," [1] comprehending "intercourse for the purpose of trade in any and all of its forms, including the transportation, purchase, sale and exchange of commodities." [2] The Supreme Court has gone so far as to state that commerce for purposes of the commerce clause can be found in *noncommercial* activities among the several states.[3]

The heritage of Congress' power to regulate commerce has been that of courts upholding legislation stated to be grounded in this rationale in incredibly strained circumstances. For example, in 1964 the Supreme Court found that the Congress could properly use its commerce power to prohibit the denial of overnight accommodations for reasons of race or color by hotels serving or offering to serve interstate travellers.[4]

The argument for Congress' authority to legislate is immeasurably stronger in the present case. As Professor Black notes, there is a massive amount of interstate commerce and interstate movement of goods and persons which is clearly and directly a function of the accessibility of beaches.

B. The enforcement of Federal rights and privileges

As far back in our national history as 1842, the Supreme Court acknowledged that it was "firmly established . . . that Congress has power to enforce, by appropriate legislation, every right or privilege given or guaranteed by the Constitution." [5] In respect to the Open Beach bill it is easily arguable that such rights and privileges are at issue.

In a recent article appearing in the Syracuse Law Review, Congressman Eckhardt made a very compelling case for the proposition that under present law the general public has a right of access to the beaches of the United States, even irrespective of private fee simple ownership.[6] Professor Black argues that any access rights accrue to the public of the several states and not merely to those of the one state in which a particular beach is located. If public easements have arisen, they are grounded in the courses of action

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[1] 2. C. Antieau, *Modern Constitutional Law* 243 (1969).
[2] Welton v. Missouri, 91 U.S. 275 (1876).
[3] Brooks v. United States, 267 U.S. 432 (1925).
[4] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).
[5] Prigg v. Pennsylvania, 16 Pet. 539 (1842), United States v. Cruikshank, 92 U.S. 542 (1874), United States v. Guest, 383 U.S. 745 (1966), Slaughter-House Cases, 16 Wall 36 (1873).
[6] Eckhardt, *A Rational National Policy on Public Use of the Beaches*, 24 Syrac. L. Rev. 967 (1973).

of citizens of more than one state. If, as Congressman Eckhardt ably contends, property rights have been created, these logically qualify as privileges and immunities within the meaning of Article IV of the Constitution, and exist, under section 2 of that Article, for the benefit of citizens of every state. In this general regard, the Supreme Court has invalidated statutes which have worked to exclude persons' entries into a particular state and have burdened departures from one state to another.[7]

If a right of access to beaches exists in favor of the general public of the United States qualifying as a privilege or immunity, this is protected by the 14th amendment. Such then is an alternate basis for the Congressional action embodied in the Open Beach bill.

C. Necessary and proper

Professor Black makes a third argument in support of Congress' assertion of a federal interest in beaches. He cites what he calls a "great physical involvement of the federal government with so many things concerned with beaches," and terms this an adequate basis for the instant federal intervention. What he seems to leave implicit in drawing his conclusion is that the Open Beach bill is a "necessary and proper" means of effectuating those assumedly legitimate ends.

On the basis of Article 1, section 8 of the Constitution, the Supreme Court has upheld Congressional action upon a finding that it has been an appropriate or even convenient means of accomplishing authorized goals.[8] In his constitutional law treatise Professor Antieau states that "Congress is, of course, the first judge of the necessity of the propriety of a regulation or project as desirable to effectuate legitimate ends. Furthermore, the Supreme Court will give great deference to the legislative body in this matter."[9] As a somewhat germane illustration, Antieau notes that when the Congress condemns private property on its finding that such is appropriate in view of an objective within its authority, an attack on this action alleging lack of federal power has almost no chance of success.

For our purposes, then, discovery of alternate constitutional bases for the beach bill legislation may be merely a matter of running through the index of the U.S. Code under "beach" and forging a plausable linkage between existing legislation and the pending bill. In this regard an argument not made by Black but which would be appealing to Congressman Dingell is the following, that the commerce clause power over navigation is uncontestable, and that public access to beaches, as in the concrete example of an individual attempting to get his boat to water, is necessary and proper, arguably even precondition to its exercise.

D. An inference

The constitutional basis for Congress' assertion of a federal interest in public access to beaches doesn't have to stand or fall on the merits of any or all of the preceding grounds separately. In addressing a challenge to Congress' authority to legislate, the courts will consider all asserted authorizations together and draw inferences from these as a whole.[10]

II. IS THE GENERAL MEANS OF IMPLEMENTING THE INTEREST, THAT OF CREATING SUBJECT MATTER JURISDICTION IN THE FEDERAL COURTS, CONSTITUTIONALLY SOUND.

A. Necessary and proper

Once it has been shown that the Congress has a legitimate basis for enacting certain legislation, the next constitutional issue is whether the means that it has chosen to implement its interest are acceptable. This is essentially the "necessary and proper" appropriateness-convenience test stated previously. It should be borne in mind that deference to Congressional finding is the pervasive judicial attitude in this area.

The principal means of implementing the federal interest asserted in the Open Beach bill is the creation of jurisdiction in the federal courts over

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[7] Edwards v. California, 314 U.S. 160 (1941), Crandall v. Nevada, 6 Wall. 35 (1867).
[8] McCulloch v. Maryland, 4 Wheat. 316 (819).
[9] Antieau, *supra* note 1, at 190.
[10] United States v. Gettysburg Electric R. Co., 160 U.S. 668 (1896).

the subject matter of beach ownership and rights. In terms of the "necessary and proper" test, this Congressional initiative needn't be considered only in regard to the general constitutional bases of the legislation, discussed earlier. For the grant of federal jurisdiction is also an obvious and valuable technique for advancing the very important and uniformly acknowledged condemnation-eminent domain powers. It is unquestionably of great benefit to the federal government to ascertain both the fact of title and of its incidents prior to moving against private landowners.

The pertinent issue is then whether it is appropriate or convenient for the federal government to create United States jurisdiction in view of all these asserted interests. The reasonable answer is yes.

B. Federal/State law

It is possible to question whether the federal government can create such jurisdiction while permitting state substantive law to control. This may be misstating the pertinent issue, for certainly the federal government is not compelled to exercise all its potential legitimate powers in every case. Nevertheless, Professors Bickel and Wellington have concluded that the federal government's creation of jurisdiction while deferring to state substantive law is permissible, at least where the interest concerned, as in the case here, is a commerce clause interest.[11] Also, federal courts are not in other cases rigidly limited to purely federal issues and questions, or cases concerning only federal matters.[12]

C. Standing/case or controversy

Black notes and dismisses other constitutional objections to the grant of federal jurisdiction. Briefly, he makes the point that the United States properly has standing to bring actions in these cases as parens patriae, sovereign or father of its country. Actions brought under the Open Beach bill also qualify as cases "arising under the Constitution or laws of the United States." Not only can they be said to arise under this very bill, but also in respect to certain of the constitutional bases of the bill and the federal government's power of condemnation-eminent domain.

III. IS THE PRESUMPTION OF PUBLIC ACCESS TO BEACHES A SECOND CONSTITUTIONALLY VALID MEANS OF IMPLEMENTING APPLICABLE FEDERAL INTERESTS, AND IS IT A VIOLATION OF LITTORAL OWNERS' DUE PROCESS RIGHTS

A. Necessary and proper

The presumptions created by the present bill are "necessary and proper" in respect to most of the same authorized ends discussed above.

B. Substantive due process

In this regard Professor Antieau has concluded, "Legislation declaring that proof of one fact or group of facts shall constitute prima facie evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred."[13] Concerning the present bill Congressman Eckhardt made a strong argument for the position that not only do the presumptions at issue here represent "rational presumptions" but the vast majority view.

C. A taking?

The present bill does create presumptions favoring a public right of access to beaches, but these are freely rebuttable. In the past the Supreme Court has found such presumptions not to violate the due process clause.[14]

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[11] Bickel and Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 Harv. L. Rev. 1, 20–21 (1957).
[12] See, for example, 28 U.S.C. 1442.
[13] Antieau, *supra* note 1, at 552.
[14] Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35 (1910), Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), Minneapolis & St. L. R. Co. v. Minnesota, 103 U.S. 53 (1904), New England Divisions Case, 261 U.S. 184 (1923).

THE LIBRARY OF CONGRESS,
CONGRESSIONAL RESEARCH SERVICE,
Washington, D.C., February 21, 1974.

To: Hon. John D. Dingell, Chairman, Subcommittee on Fisheries and Wildlife, Conservation and the Environment.
From: American Law Division.
Subject: Constitutional Issues Relating to H.R. 10394, 93rd Congress, "to Establish a National Policy With Respect to the Nation's Beaches."

This responds to your letter asking four questions relating to the constitutionality of provisions of H.R. 10394, 93rd Congress, declaring a Federal interest in public access to beaches. The bill defines the term "beach," and declares a national policy that "the beaches of the United States are impressed with a national interest and that the public shall have free and unrestricted right to use them as a common to the full extent that such public right may be extended consistent with such property rights of littoral landowners as may be protected absolutely by the Constitution." The bill further authorizes United States attorneys to bring suit in federal court to establish the public's right to use beaches, either by condemnation or by a determination that such rights already exist. For such actions, the bill would establish a presumption that "a showing that the area is a beach shall be prima facie evidence that the title of the littoral owner does not include the right to prevent the public from using the area as a common."

Your first question is whether there are "adequate constitutional grounds for asserting a Federal interest in public access to beaches." Although we cannot provide a definitive answer to this question, we think that arguments can be made that the bill, if enacted, could be upheld as an exercise of the power to regulate interstate commerce, Art. 1, § 8, I. 3. The authority to condemn such property interests as are necessary to allow public access to and use of beaches would not, we think, be subject to serious constitutional challenge. To the extent that the bill guarantees to citizens of the United States equal access to beaches which state or local governments attempt to reserve to their own residents or for which discriminatory user fees are charged to nonresidents, the bill might arguably be supported as an exercise of congressional power under section 5 of the Fourteenth Amendment.

Section 202 of H.R. 10394 suggests some connection between the purposes of the bill and the commerce clause by the following language referring to beaches: "(b)y reason of their traditional use as a throughfare and haven for fishermen and sea venturers, the necessity for them to be free and open in connection with shipping, navigation, salvage, and rescue operations, as well as recreation, Congress declares and affirms that the beaches of the United States are impressed with a national interest . . ."

One aspect of the power to regulate interstate and foreign commerce is the power to regulate navigation. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824). The power is not confined "to acts done on the water, or in the necessary course of the navigation thereof," but "extends to such acts, done on land, which interfere with, obstruct or prevent the due exercise of the power to regulate commerce and navigation . . ." *United States* v. *Coombs*, 37 U.S. (12 Pet.) 71, 77 (1838). "(A)lthough the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution." *Gibson* v. *United States*, 166 U.S. 269, 272 (1897). Arguably, under these principles, Congress may legislate to protect such public easements as have been created by the public for access to navigable waters.

The power to regulate interstate commerce is far broader than the power to regulate navigation.

The Commerce Clause reaches in the main three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods (8 U.S.C. §§ 2312–2315) or of persons who have been kidnapped (18 U.S.C. §1201). Second, protection of the instrumentalities of interstate commerce, as, for example, the destruction of an aircraft (18 U.S.C. §32), or persons or things in commerce, as, for example, thefts from interstate shipments (18 U.S.C. § 659). Third, those activities affecting commerce. *Perez* v. *United States*, 402 U.S. 146, 150 (1971).

If Congress were to find that recreational use of the nation's beaches constitutes a form of interstate commerce, or at least that a significant amount

of such use is by persons travelling in interstate commerce, then, arguably, a law prohibiting obstruction of public use of public beaches might be upheld as an exercise of congressional power to protect commerce, or to regulate activities affecting commerce. These need not necessarily be "particularized findings" by Congress written into the statute itself, although the Supreme Court will look to any such "findings" for evidence of a connection with interstate commerce. *Perez, supra*, 402 U.S. at 156. In *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), the Supreme Court upheld application of the Civil Rights Act of 1964 to prohibition of racial discrimination in places of public accommodation. The Court's opinion dismissed the contention that the operation of the motel in question was "purely local" in character by reference to the established principle that Congress may regulate "those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. 379 U.S. at 258, quoting *United States v. Darby*, 312 U.S. 100, 118 (1941). Or, in the concise words of another opinion, "(i)f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Mfrs. Assn.*, 336 U.S. 460, 464 (1949). "Nor does it make any difference," said the Court in *Heart of Atlanta*, 379 U.S. at 256, "whether the transportation is commercial in character."

The right of eminent domain has been described as an incident of sovereignty, and the requirement of just compensation a limitation imposed by the Fifth Amendment. *United States v. Jones*, 109 U.S. 513, 518 (1883). It is well settled that lands taken for public parks are taken for a public purpose. *Shoemaker v. United States*, 147 U.S. 282 (1893). It would appear that the only serious constitutional issues involving condemnation authorized by the open beaches bill would relate to just compensation.

As mentioned above, an argument might be made that H.R. 10394 in part is an exercise of congressional power under section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions" of that Amendment, in this case the equal protection clause, or perhaps the privileges and immunities clause. There has been litigation in state courts over whether a local governmentation can exclude nonresidents from its beaches (*Gerwitz v. City of Long Beach*, 330 N.Y.S. 2d 495 (Sup. Ct. Nassau Cty, 1972), and whether a local government may charge discriminatory user fees to nonresidents (*Borough of Neptune City v. Borough of Avon-by-the-Sea*, 2 ELR 20520 (Sup. Ct. N.J. 1972). These decisions were not based on the Fourteenth Amendment. While H.R. 10394 does not seem to be expressly tailored to this particular problem, section 202 does refer to a "national interest" and it might be assumed that the "public" referred to is the public of the United States. If the word "person" as used in section 203 were defined to include states and political subdivisions thereof, then the bill might be interpreted to prohibit imposition by those governments discriminatory restrictions on public access to beaches.

Your second question is whether "the technique adopted in H.R. 10394, of empowering Federal courts to act in these matters [is] constitutionally sound."

We see no particular constitutional problem with vesting jurisdiction in federal courts to hear, and with directing the Attorney General or United States Attorneys to bring, actions to remove obstructions to interstate commerce, or to institute condemnation proceedings. Were an action to be brought by the United States solely to "determine the existing status of title, ownership, and control" of oceanfront land to which the United States has no claim of title, then there would appear to be no "case" or "controversy" within the meaning of Article III of the Constitution. The same challenge might be raised to an action by the United States to determine the existence of a public easement, prescription, or dedication established pursuant to state law, the argument being that the United States lacks standing to assert rights possessed by a state or by citizens of that state. If the federal interest can properly be viewed as preventing restraints or obstructions to interstate commerce, or as enforcing rights guaranteed by the Fourteenth Amendment, this argument, we think, would fail.

Your third question is whether "the creation of a Federally recognized presumption [is] a valid mechanism for accomplishing the purposes of the legislation." We see no particular constitutional problem in establishment of a rebuttable presumption as an evidentiary rule for federal court actions in which

the factual issue (the existence or non-existence of a public right to use a particular beach) is to be decided by application of state law. Presumably the substantive state law would not be changed by operation of such a rebuttable presumption.

Your fourth question is whether "the presumption created in the bill constitute[s] a violation of due process under the Fifth Amendment." The principles guiding resolution of this issue were set forth by the Supreme Court in *Western and Atlantic Rrd. v. Henderson*, 279 U.S. 639, 642 (1929).

Legislation declaring that proof of one fact or group of facts shall constitute *prima facie evidence* of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A *prima facie* presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the particular presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Legislative flat may not take the place of fact in the judicial determination of issued involving life, liberty or property.

In the *Western & Atlantic* case, the Court held invalid a rebuttable statutory presumption of negligence on the part of a railroad company upon proof of the fact of a collision at a grade crossing between a railroad train and a motor vehicle. In another decision, the Court upheld against due process challenge a state statute providing that proof of injury resulting from derailment of a train constituted *prima facie* evidence of negligence by the railroad. *Mobile, Jackson & Kansas City Rrd. Co. v. Turnipseed*, 219 U.S. 35 (1910). Apparently the presumption in *Western & Atlantic* was considered to be more arbitrary than the one in the *Mobile* case. Another distinction was that under the statute at issue in *Western & Atlantic*, the presumption did not fail with introduction of opposing evidence, but was given the effect of evidence which the jury was to weigh against the opposing testimony. In the *Mobile* case, on the other hand, the statute was interpreted as meaning that the inference was "at an end" upon introduction of opposing evidence.

Thus the due process issue relating to the presumption, i.e. whether a landowner would be deprived of due process by operation of the presumption, would be determined by a decision as to whether the presumption is arbitrary, or whether "there is a rational connection between what is proved and what is to be inferred." The answer may vary from state to state, as well as from case to case, since the presumption of a right of public use of a beach may be more arbitrary under the laws and traditions of one state than it is in another state.

GEORGE A. COSTELLO,
Legislative Attorney.

OFFICE OF THE GOVERNOR,
Salem, Oreg., October 15, 1973.

Hon. BOB ECKHARDT, *U.S. House of Representatives, Washington, D.C.*

DEAR BOB: I have examined H.R. 10394 with great interest, and regret I cannot take part in the scheduled hearings October 25 and 26. I am directing my Administrative Assistant in Washington, D.C., Mr. Dale Mallicoat to attend.

H.R. 10394 contains much of the concepts of the Oregon Beach Law enacted in 1967 and subsequently refined in 1969. I know you are aware of the challenges to the Act which we have defended successfully in court, and it is interesting to note that the doctrine of a "commons" was used by the Oregon Supreme Court in upholding the law. Lower courts had defended the prescriptive right to which your proposal also speaks.

Oregon's initial law in 1967 defined the beach to a sixteen foot elevation above the line of lower water. In 1969 this was changed to the line of vegetation, with that line defined in law using the Oregon coordinate system, with our law physically defining on the ground the vegetation line. Any invasion of the line is only by permit, and rarely approved.

I am confident Oregon's law would assure full compliance with the federal requirements to receive implementation funds for access and transportation to the beaches. We have had a vigorous program reaching back several years to acquire access not less than every three miles. Oregon maintains sixty-two

state parks and waysides on the Oregon coast, with counties and cities also supporting park ways.

Best wishes to you in your legislative effort, and if I can be of assistance further let me know. Oregon's legislation for public use of the beaches in perpetuity is the landmark law in this area, an action of which I am particularly proud.

Sincerely,

TOM MCCALL, *Governor.*

CSSS MICHIGAN CHAPTER—SAVE LAKE SUPERIOR ASSOCIATION,
Marquette, Mich., October 20, 1973.

Representative ROBERT ECKHARDT,
House Office Building,
Washington, D.C.

DEAR REPRESENTATIVE ECKHARDT: Citizens to Save the Superior Shoreline is a volunteer organization of approximately 200 persons located in Michigan's Upper Peninsula with members from several other states.

We have directed efforts in the past 4–5 years toward preservation of natural areas of Lake Superior shoreline, gaining public access and protecting certain valuable sections from over-development.

We have read with interest the text of H.R. 10894, the "Open Beaches" bill. We would like to extend our support to this legislation as it reaches the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries on October 25–26.

This proposed legislation touches directly on the concerns we have been trying to meet during the past years. Marquette County, fronting for 70 miles on the Lake Superior south shore, has only 3.2 percent of the shoreline in public ownership. In great measure, this percentage is contained in narrow strips caused by highway rights-of-way. Northern Michigan is experiencing extensive land development, and monthly more and more shorelands are being closed to public access and usage.

Therefore, we strongly support this proposal to set up procedures for gaining and maintaining public access on any major water bodies, including the Great Lakes. Please use this letter for transmittal to the Subcommittee or any other persons who may be considering the merits of this proposed legislation.

Sincerely,

MS. LYNN M. EMERICK,
Secretary.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
October 19, 1973.

Hon. JOHN DINGELL, *Chairman, Fisheries and Wildlife Conservation Subcommittee, Longworth House Office Building, Washington, D.C.*

DEAR CONGRESSMAN DINGELL: Governor Evans has requested that I provide the following comments and questions regarding the H.R. 10894—National Open Beaches Bill:

1. The definitions of "Sea" is unclear as to whether Puget Sound and Straits are included. Suggest this be made consistent with Coastal Zone Management Act definitions.

2. The definition for line of vegetation could make it difficult for States with Shoreline programs such as ours. Perhaps the act should have an alternative that says where states have established criteria other than contained in this act, the states' definitions shall prevail. In any event the 200 ft. limit, from mean higher tide, when no line of vegetation exists, is totally inadequate. Also, the line of begetation is subject to seasonal changes.

3. Section 203 should make it clear that the act does not permit unrestricted access to the beach from the upland side. This would not only be unreasonable interference with property owners, but could be disaster to dunes. Access from upland should be through condemned, purchased corridors with adequate parking.

4. Section 208 should be tightened up to allow restriction of type of public use, such as limiting it to pedestrian or non-motorized use.

5. Perhaps the act should specifically exempt Indian lands.

We appreciate the opportunity to comment on this legislation.

Very truly yours,

JOHN A. BIGGS,
Director.

TERRITORY OF GUAM,
OFFICE OF THE GOVERNOR,
AGANA, GUAM, *October 26, 1973.*

Hon. BOB ECKHARDT, *Congress of the United States, House of Representatives, Washington, D.C.*

DEAR CONGRESSMAN ECKHARDT: Thank you for your letter of October 5, 1973, concerning the scheduled hearings on the National Open Beaches Bill (H.R. 10894). It is very doubtful that we would be able to send a representative to testify on the bill because of our present schedule. I strongly feel, however, that your measure will have a significant impact on our Territory and therefore offer the following general thoughts for your consideration.

The people of Guam share your views on the need to preserve and maintain public sovereignty over the oceanshores, and our Territory has recently enacted an "open beach" law (P.L. 12-19), which is identical in principle to H.R. 10894. The Guam law seeks to safeguard the public's rights of untrammeled and perpetual access along our island's seashore. Public Law 12-19 further authorizes the acquisition of ownership or interest to any part of the oceanshore presently held in private ownership.

One of the difficulties in our attempts to execute the full extent of P.L. 12-19 is directly related to our limited financial resources for the necessary planning, survey, acquisition, and development of the oceanshore. The resolution of some of the problems requiring adequate funding would be greatly enhanced by passage of your National Open Beaches Bill, which would provide federal financial assistance in matching local funds for the preservation and protection of the public's rights along Guam's shores. I am confident that P.L. 12-19 will meet, or can be amended to meet, the compliance requirement of H.R. 10894 when the latter is enacted.

In summary, I feel that the enactment of H.R. 10894 will greatly enhance Guam's efforts to preserve and protect her oceanshore, and I certainly welcome your efforts in this regard.

Sincerely yours,

CARLOS G. CAMACHO,
Governor.

ENVIRONMENTAL POLICY CENTER,
Washington, D.C., October 31, 1973.

Congressman JOHN DINGELL,
Chairman, Subcommittee on Fisheries and Wildlife Conservation, House Merchant Marine and Fisheries Committee.

DEAR MR. CHAIRMAN: I am writing to you about H.R. 10894, a bill which would establish a national policy with respect to the nation's beaches and would seek to protect the public's right in the beaches. The Environmental Policy Center is in support of this legislation and urges swift passage of the bill.

Although the bill does not deal directly with the question of shoreline erosion, the problems caused by shoreline erosion are intimately related to the ownership of land along the coasts and the attempts to protect structures erected along the coasts by use of engineering techniques such as jetties and seawalls. The heart of the problems relating to shoreline erosion lies in the placing of man-made structures too close to the coast, sometimes on the seaward side of the dune line. Naturally this leads to cries of protection, followed by beach erosion control projects. These erosion control projects are generally very expensive and can lead to the destruction of the area which they are designed to protect. Had the coastlines been under public ownership this pressure for federal aid would not have arisen, and the coastlines would not be viewed as being "in jeopardy" of destruction by erosion.

The National Park Service is to be commended for its recent policy decision relating to managing national lakeshores where it determined that the best

policy is to leave the coastline alone and not attempt to "save it by engineering techniques." I am submitting two articles for the hearing record. The first article describes the scientific basis behind the Park Service's decision on the Outer Banks of North Carolina. The second article, which I prepared earlier this year, sets forth a model shoreline erosion philosophy and provides many reasons for supporting legislation like H.R. 10394.

I would appreciate it if this letter and the accompanying articles could be made part of the hearing record.

Sincerely,

BRENT BLACKWELDER,
Washington Representative.

AS THE SEASHORE SHIFTS

TRYING TO STABILIZE BARRIER BEACHES APPEARS TO BE A LOSING PROPOSITION

(By Dietrick E. Thomsen)

From Cape Cod to the Rio Grande del Norte the east coast of the United States is characterized by the presence of barrier beaches, long, low sandy islands lying off the shore of the mainland, separating salt or brackish bays from the ocean.

These barrier islands are regions of what might be called instant geology. The granitic face of a mountain in the interior of the continent may stand virtually unchanged for centuries; wind and water work only slowly on it. But the interface between ocean and sand is highly volatile. The topography can be changed overnight. One severe storm is enough to open new inlets, close old ones, and alter the line of the beach perceptibly.

It is not on record that the shiftiness of these sands bothered the aboriginal inhabitants of the continent very much, but it has bugged the Europeans ever since the first time an explorer failed to find an inlet charted by his predecessor. The seashore resort business got started in the late eighteenth century—Cape May, N.J., was advertising in Philadelphia papers at the time of the Constitutional Convention—but it really took off in the late nineteenth when cheap transportation brought the masses to the boardwalk. Large and small towns grew up on the barrier islands: Atlantic City, Ocean City, N.J., Ocean City, Md., Miami Beach.

The people found that they had indeed, in the sense of the Gospel parable, built their houses upon sand. As a result, beach erosion is a cry that can squeeze millions out of public treasuries in a state like New Jersey. Man took heroic measures to stabilize the shore as he found it. In developed areas sea walls, jetties and sand bags are common. Along the undeveloped islands, especially those under the jurisdiction of the National Park Service, artificial dunes were built.

Erosion is a natural process. Recent studies under the sponsorship of the National Park Service, especially those by Paul J. Godfrey of the University of Massachusetts and Robert Dolan of the University of Virginia, tend to show that nature is not interested in a stable beach line, and that it would be more beneficial in the long run to lie back and let the changes occur.

"Erosion is a man-conceived evil that only man worries about especially when it threatens his structures," remarks Godfrey. "In the natural order of things, a dynamic stability exists on the barrier islands, where the power of the sea is met by flexibility and erosion is met by subsequent buildup elsewhere."

Two major kinds of erosion affect the beaches. One sort is accomplished by longshore currents that are generated when waves strike the shore obliquely. The longshore currents carry sand up and down the beach, taking away in one place and adding in another. Longshore erosion can be important in many places as it gradually alters the beach line. But, says Dolan, in most places 70 to 90 percent of the erosion comes from the other cause, surging seas such as those caused by storms. Nor could longshore erosion have built the islands. The composition of the island material indicates, says Godfrey, that most of it could not have been brought by longshore currents. It must have been brought up by the ocean and been worked and reworked in place by surging seas.

It is against storm seas that the sea walls and dune lines have been built, to prevent them from washing over the islands. Such overwash is considered

an unmitigated evil by residents of the islands. Dolan and Godfrey say it is necessary to the survival of the islands.

As Godfrey describes it in a National Park Service publication, *Oceanic Overwash and its Ecological Implications on the Outer Banks of North Carolina*, if these high seas are allowed to wash over the islands, they deposit on the bay side the sand they dig from the beach on the ocean side. Thus what is eroded from the ocean side goes to build new land on the bay side. Since the level of the ocean has been rising more or less steadily since the Pleistocene era—in the North Carolina region it is rising about three feet per century—overwash is facilitated and the island marches steadily backward toward the mainland. Along most of the Atlantic and Gulf coasts, the mainland shore is very flat so that the mainland shore recedes too as the water rises, and the bay stays more or less the same width. The ecology of the barrier islands, their native vegetation, especially the hardy species of beach grasses, are well adapted to these processes, Godfrey found. When inundated by overwashed sand, they come back up through it.

If overwash is prevented by dunes or sea walls, Dolan writes in the April 21 SCIENCE, the heavy seas must dissipate their energy against the beach alone. They gradually cut in narrower and steeper. In the process they grind up the sand grains to a fine sediment that will no longer stay on beaches. This is washed out to sea and down to the bottom and lost to the geological economy of the island. Furthermore sand that would increase the marshes in the bay and raise the bay bottom is not brought in. Says Godfrey: "A paradox will soon develop in which erosion occurs on both sides of the barrier islands because man thought he was creating a stable system by building high barrier dunes."

Dolan therefore suggests that in the remaining underdeveloped islands dune stabilization be abandoned and nature be allowed to take its course. Buildings should be confined to the bay sides (as settlers in colonial times in fact did), and they should not be of such expensive construction as to require 30 or 40 years to pay themselves back. He argues that the costs of cleaning overwashed sand from roads or around buildings, even "plugging an inlet now and then" would be less than maintaining the dunes.

The National Park Service quite agrees with these recommendations, says Robert M. Linn, director of the Park Service's Office of Natural Science Studies, and allowing nature to take its course is already policy on uninhabited islands. On islands where some people live—Cape Hatteras, for example—"you get into the realm of politics," notes Linn. "Very few people really understand what it is he's [Dolan] proposing." Substantial buildings, even motels, exist near the ocean and owners put on pressure for a permanent-dune policy. "In the long run more is lost and probably lost quicker that way," says Linn, and the Park Service is trying to convince people. But Linn is afraid that beach property owners will hang on "till the last grain of sand is on the chimney." He wishes there were some program by which appropriate Federal or state agencies could buy up the land within a mile of the ocean, which is the greatest danger zone for the foreseeable future.

For the really developed beaches, says Dolan, the only possibility is replenishment. Sources of beach sand must be found at sea, the sand dredged up and dumped on the beaches to make up for what is eroded away. The alternative is gradually abandoning the seashore communities. If the sea continues to rise, Linn foresees a day when the fight for stabilization will become too costly. But that will not be for a long time because of the extremely high property values in the developed communities.

Fortunately for them, and probably fortuitously, the large barrier-island communities like Atlantic City, Ocean City and Miami Beach are in regions where the seas are on the average gentler and the erosion slower than on the North Carolina Banks, for example. "If you look at a chart of hurricane tracks," says Linn, "you will see that a lot of them seem to converge near Cape Hatteras." Godfrey counts at least 149 hurricanes that have affected the North Carolina coast since Sir Francis Drake recorded one on his visit in 1586. "You could not maintain a large city at Cape Hatteras for very long," says Linn. Or as they say on television: It's not nice to fool Mother Nature.

Shoreline Erosion Philosophy

INTRODUCTION

The management of our nation's coastlines has generally been very shortsighted and has resulted in degradation of aesthetic values, destruction of fish and wildlife resources and habitat, extensive property damage, large windfall profits to speculators, disturbance of the natural ecological balance, and increasing costs to the taxpayers.

NATIONAL SHORELINE STUDY OF THE CORPS OF ENGINEERS

The first National Shoreline Study completed by the Corps in the fall of 1971 emphasizes that shore protection programs are not keeping up with "needs" and asserts that measures to halt erosion appear justified for 2,700 miles of shoreline at an estimated cost of $1.8 billion. The recommendations in the National Shoreline Study on the need for research into the processes contributing to shore erosion and for action to insure comprehensive planning and management of the shoreline in the best national interest are commendable. However, the Report on the National Shoreline Study which was submitted to Congress really fails to come to grips with the central issues involved in shoreline erosion programs and fails to spell out the role man has played in accelerating destruction along the coastline. The Report instead is written in such a way as to encourage the continued modification of the shoreline by man under a more accelerated program that has not been a proven success in the past. It is extremely doubtful if more public works along the coast will alleviate the existing conditions and may in fact intensify critical conditions in the future.

The problems relating to coastline ecology are complex, yet the Corps' Report tends to imply that simplistic engineering solutions will take care of erosion. The Corps seems to be suggesting that we launch a massive program to "protect coastlines from eroding." Before any such program is initiated, we believe that a model philosophy should be developed regarding how man is to treat the coastlines. In the absence of such a philosophy and a shoreline management program embodying its principles, the nation may find itself supporting a program which (a) proves to be enormously costly to the taxpayer, (b) provides a major stimulus to more unwise shoreline development, (c) results in more damages to property than occurred before initiation of the program, (d) causes new and unanticipated property damage elsewhere along sections of the coast not previously experiencing erosion, and (e) causes damage to shoreline ecosystems. We believe that the very goal of the shoreline program—to prevent shorelines from eroding—is misguided in the sense that it fails to recognize that coastal erosion and deposition are natural ongoing processes and that marine and coastal environments are adapted to these processes. Before any action is taken to begin shoreline erosion control programs, a comprehensive shoreline management program should be established embodying the following basic principles.

BASIC PRINCIPLES

1. Man's problems with coastal erosion occur almost exclusively because man has chosen to erect structures too close to the shoreline. The coastline is one of the most constantly changing environments on the surface of the earth. Alterations by erosion and deposition are the expected thing, not catastrophic, unusual, or unexpected events. Such alterations are continuously occurring. Each century we can expect that a certain number of storms and hurricanes will strike the coastlines. Marine ecosystems are accustomed to and readily recover from the changes brought about by these storms and hurricanes. Construction of fixed structures along the coastline simply invites destruction of the structures sooner or later.

2. Construction by man on the shoreline can often disturb the delicate equilibrium between energy and materials and can in itself be a primary cause of increased erosion. Evidence accumulated by Dr. Robert Dolan at the University of Virginia and Dr. Paul Godfrey of the University of Massachusetts shows that dune and beach stabilization projects of the Corps are causing beach steepening and increasing the depth of the inner shelf of the shoreline

and that by failing to recognize that the highly flexible nature of the barrier islands off North Carolina is essential to their survival, the Corps may be contributing to their destruction.

3. Steps taken by man to prevent erosion often create new problems of excess erosion or deposition which must then be taken care of. For example, in 1917 a jetty was built on the Oregon coast to stabilize the inlet to Tillamook Bay. Serious erosion causing property damage began in the late 1920's which eventually destroyed the resort town of Bayocean since the longshore drift sand was blocked by the jetty. In similar fashion, part of the town of South Cape May, New Jersey, has fallen into the ocean due to shoreline engineering structures. Now Cape May, the earliest shoreline resort in the country, is largely seawalls and jetties and of little recreational value because of over-engineering. Miami Beach has no beaches because of shoreline engineering. Beaches in general survive only when left alone, unless great expense is expended on restoration.

4. The cost of saving property along the shore often equals or exceeds the value of the property to be saved. Furthermore, many measures to prevent beach erosion are temporary and must be expensively maintained or repeated over and over again.

5. Federal, state, and local governments should not pay for efforts to protect private property along the shoreline, nor underwrite protection policies. Beach property owners are not the general public and in fact represent a small group of people. It is the private property owners which are directly or indirectly responsible for the existence of the "erosion problem." Those who build near the coast are taking serious risks but are not willing to assume the costs of such risks. Instead, they desire to saddle the taxpayer with the cost of protection. Whether a beach is growing or shrinking is of no short or long range concern to the swimmer, surfer, fisherman, or hiker. It only becomes a problem when people have erected fixed structures along the shore. The public should not be asked to pay for foolish acts of those who invite disaster from normal ongoing processes along the coastlines. If the Federal Government assumes a greater role in protecting private shoreland, several unfortunate results may occur. More construction is likely to be initiated close to the shoreline with the expectation of federal assistance if anything goes wrong. Overdevelopment of the coastlines will thus be spurred on, thereby increasing the likelihood of enormous property damage and loss of life when a large storm does occur. Planning groups in Rhode Island and Georgia have recognized the ballooning costs and futility of shoreline engineering and have suggested that after the next storm, shoreline easements should be purchased and redevelopment prevented.

GUIDELINES FOR SHORELINE MANAGEMENT

It is not possible to lay down detailed uniform policies for managing all shorelines due to the wide variety of special circumstances in each locality; nevertheless, we believe th at there are certain and general guiding principles which should be adhered to in formulating shoreline management programs.

GUIDELINES FOR UNDEVELOPED SHORELINES

The coastlines of the lower 48 states have been developed to such an extent that little primitive and natural unspoiled coastline still exists. Therefore, in order to keep options open for future generations, to preserve significant coastal stretches for scientific investigations, and to maintain appropriate natural balances, the few remaining undeveloped shorelines in the lower 40 states should be declared off limits to development and should be preserved in their natural condition. Development near these areas which would lead directly or indirectly to their depreciation or destruction should not be permitted. Any structures built near the coast should be erected far enough back from the shoreline to allow the beach to change shape in response to storms.

GUIDELINES FOR DEVELOPED SHORELINES

Along developed shorelines, alternative plans of management should be explored. The cost of purchasing the endangered property should be balanced against the cost of protective works including maintenance. Should the purchase price be less than the cost of protection, then the purchase should be made. There are obviously two values associated with shore property: that between a willing buyer and seller and the investment of the present owner. For

evaluation of property costs along a shoreline to be balanced the cost of protective works, the second is the logical value to use. The first is entirely immaterial if the protection is not provided and may be non-existent. Thus, no land owner would be asked to suffer a monetary loss but neither would the taxpayer be burdened with inflated values brought about by shortage of shoreline property. Prior to the installation of any works of protection, a thorough study should be made to ascertain (a) whether the works of protection will cause worse damage elsewhere, (b) whether the works will soon require replacement or repetition, and (c) whether the works will spur further unwise development along the shoreline.

[Telegram]

HOUSTON, TEX., October 25, 1973.

Congressman JOHN DINGELL,
Subcommittee on Fishery and Wildlife Conservation and the Environment,
House of Representatives,
Washington, D.C.

For the record of hearing HR 10394. Houston Audubon Society membership 1,200 supports Congressman Bob Eckhardt Open Beaches Act HR 10394 and expect you to endorse this fine piece of legislation benefiting all the people of this Nation adequate and free access to all beaches and shore lines is of great public benefit the Texas open beach laws had greatly beenfited the people and recreation industry in this area. Generously defined beaches are an essential ingredient of open beaches legislation.

D. NARRACK, M.D.,
Houston Audubon Society.

UNITED MOBILE SPORTSFISHERMEN, INC.,
Wethersfield, Conn., October 23, 1973.

Hon. JOHN D. DINGELL,
Rayburn House Office Building,
Washington, D.C.

DEAR SIR: My organization has requested that I write to you expressing our support of House Bill HR 10395. I, also, wish to request that the contents of this letter be included in the record of the Oct. 25th and 26th hearings of your Subcommittee.

Of the many miles of beaches along the East coast, or any coast for that matter, very few are open to the public. With the increase of population and the leisure time available to them, a proportional decrease in the place in which to enjoy that leisure is taking place. Both private individuals and industry have, in the last 10-15 years, removed access to the shore by fencing land adjacent to the beach and thus denying access except by trespass. It is our belief that the general public has a right to beach access and that our right has been consistently denied at local and state level for many years. Thus, we are placing our hope for much needed relief in House Bill HR 10395.

Although we are primarily a sportfishing organization, we believe that the Nation's beaches, with the great potential they have for enjoyment by a large diversity of the general public, must be kept open to the public. Not only for this generation but, for future generations.

Sincerely,

RICHARD W. GRIFFITH,
Legislative Chairman.

HOUSTON, TEX., *November 1, 1973.*

Hon. JOHN DINGELL,
Chairman, Subcommittee on Fisheries and Wildlife Conservation,
Washington, D.C.

DEAR SIR: It is my understanding that your Committee is handling Rep. Bob Eckhardt's National Open Beaches Bill H.R. 10394.

I wish to enter my plea that this bill be considered with favor. *All* of the people need the beaches and not just a handful of the wealthy who can afford to buy up all the bordering land and claim the beach as their own.

In Texas our beaches have always been open to the public from the day white man first set foot on Texas land. Then a political decision by the court set the ownership at the high tide mark and fences leading into the surf sprang up overnite. Bob Eckhardt worked like a horse to get the rights to the Texas beaches restored to public use by having enacted his Texas Open Beaches bill.

The beach is a part of the ocean which belongs to everyone. Please do your best to get our beaches open to the public in every seashore state in America.

Yours truly,

HARDY R. FIELDS.

MANAGING COASTAL LANDS

How to foresee the economic, environmental, social and aesthetic costs.

The coastal zones, where the land meets the sea, are complex, biologically productive areas increasingly used by men. Bays, estuaries, and intercoastal waters serve as harbors for ships and provide inexpensive transportation for cargo. The land is dredged, filled, crowded by expanding communities and industrial sites. The water provides a cooling medium for electric power generation and receives sewage, toxic materials, solid waste, and construction project sediments. Yet these fragile areas serve as spawning and feeding grounds for a majority of the fish and aquatic creatures obtained from the sea, and for all the shrimp, oyster, clam and lobster harvests. And man in his leisure also makes demands of these ecosystems for recreation and aesthetic enjoyment.

Although the coastlines are a continuous border around the landform, they differ from one another in many respects, depending upon the latitude, geology, water, and combination of plants and animals. Along the northeast coast of North America jut craggy rock shores subject to winter icing; the Middle Atlantic States' coasts tend to have lowland streams, coastal marshes, and mudflats. Farther south, extensive marshes and swamps form much of the coast, with turbid waters and muddy bottoms harboring many shellfish. The northern coast of the Gulf of Mexico is muddy, flat, swampy, subtropical; whereas the Pacific coast is generally mountainous and rocky.

The problem of determining how man can get maximum use of specific coastal regions while still preserving them is the concern of two research groups now studying the flat, marshy shoreline of Texas along the gulf coast and the edge of the Delaware River and Bay.

TEXAS COAST

The coastal zone of Texas stretches some 400 miles long and two or three counties wide from the Sabine River at the Louisiana border to the Rio Grande at Mexico. It is only one-eighth the area of Texas—yet one-third of the State's population and economic activity is concentrated there.

More than 40 percent of the U.S. petrochemical industry is located there and 19 percent of its refining capability. Some 35 percent of the Nation's entire supply of oil and gas is produced along these flat, windswept shores extending into the Gulf of Mexico—bringing billions of dollars in business to Texas annually.

Along the coastal waters travel almost three-fourths of all goods shipped from Texas to other States, and more than 200 million tons of cargo are handled a year in 11 deep draft ports—some of which are among the largest in the Nation.

This coastal zone sustains other activities too. For instance, approximately 90 percent of the gulf's species of sea-living animals depend on the Texas estuaries. About 13 percent of the world's shrimp tonnage comes from the Texas coast; and more than 150 million pounds of fish are caught annually—a $200 million industry for the State. And increasing numbers of people are using the beaches and waterfronts for sport fishing, boating, and swimming. The coastal zone is also refuge to many North American migrating ducks and geese, as well as to more than 400 other bird species.

State planners concerned with these affairs are facing some hard decisions involving the conflicts between potential growth and development versus protection of the coastal environment and resources. They've already recognized the

severe damaging effects of overdevelopment and wastes on Galveston Bay, for instance, with its string of industrial complexes extending inland to Houston, third largest port in the United States. Subjected to deterioration by development of oil refineries, petrochemical plants, steel mills, and food processing activities, as well as by intense channeling and dredging for transportation and flood control projects, the area is now drastically polluted. In comparison, and still open to regulation, is the less developed Matagorda Bay, with only a few aluminum and chemical plants and sand and gravel operations. Then there is the Corpus Christi Bay system, an area of potential land and industrial boom but where State legislative control and local awareness can attempt methods of effectively managing the coastal zone for the mutual, long-range benefit of the economy and the environment.

"We've already lost Galveston," says Bob Armstrong, Commissioner of the State's General Land Office. "And we might lose Corpus Christi by similar processes of overdevelopment. If the same pattern continues, we could lose the whole coastal zone." Armstrong is an advocate of more scientific analysis and methodology for environmental management. When he was a State Representative, he

sponsored the Bay Study Committee that led to the legislature prohibiting the sale of State-owned submerged lands. He counts on university research as well as State counsel and industrial advice in making decisions for the coastal zone.

This is where research being done by a coastal management study team at the University of Texas at Austin comes in. Headed by E. Gus Fruh, professor of environmental health engineering, the study group has been developing a systematic approach for the evaluation of the economic and environmental effects of various possible management policies concerning the coastal zone. For the study, the team focused on the 13-county Coastal Bend area centered around Corpus Christi Bay.

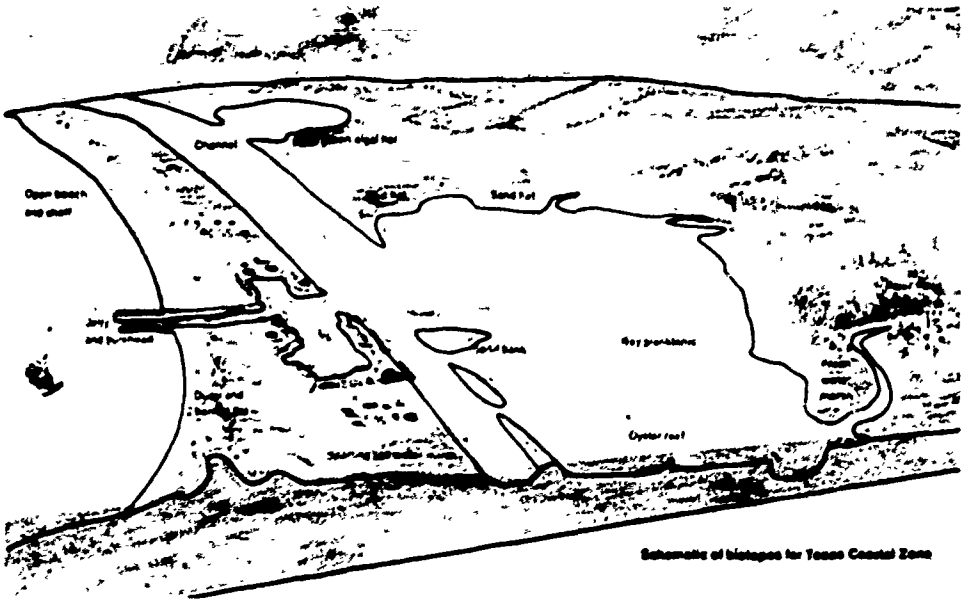
Five task forces were formed to look at specific areas of concern to planners. These five task forces—economics and land use, water needs and waste residuals, estuarine modeling of water movements and material transportation, resource capability units, and biological use criteria—operate so that outputs from one group can be easily used as inputs for others.

Results of preliminary studies have already been incorporated into the State's coastal resources management program—such as restrictions on off-shore dredging, on building on any coastal public land, and on driving vehicles or engaging in other activities harmful to sand dunes in certain dune areas. Further findings from the project have good chances also of being implemented into State coastal legislation.

The Texas legislature has long been concerned for the "sensible and protective development" of its coastal lands and natural resources. The State government, which maintains dominion over much of the land, helped establish the port and waterway transportation system, supported coastal and offshore production of petroleum, and fought to maintain mineral extraction rights from submerged lands as far as ten miles into the gulf. In recent years, it declared a moratorium on the sale and lease of submerged land and passed a coastal zone management act to comply with terms of the Federal coastal zone act.

Land use and economics

As more industries state their intention to enter the Coastal Bend region, questions arise as to where they will locate, what type of production and de-



Schematic of biotopes for Texas Coastal Zone

Biotopes. As a step towards evaluating the impact of development on the Texas coast's life, assemblages of plants and animals typically found in different areas were identified. This drawing of an idealized coastal area shows where 13 of those biotopes would be found.

mands they will bring, and what will be the needs of the employees they attract—whether they live in single houses, apartments, or trailers; whether they prefer highways or parks or beaches for recreation.

In order to assess the impact of this anticipated activity upon the environment and to present a range of land use policies to State planners, the research team is developing models to project the various possible economic consequences of different kinds of growth. They also project future expectations of the numbers, needs, and composition of incoming populations.

They'll use a series of coupled mathematical models to evaluate the impact of land use management policies that include the nature and location of industrial and residential activity, transportation systems, and water supply and waste treatment models to help determine the capacities and locations where this industrial and residential development would be likely to occur.

Environmental units

To help establish basic criteria for effective decisions concerning coastal management, the research team has defined and mapped some 70 major land types, or resource capability units as they are called—such as grassflats on bays or estuaries, salt- or fresh-water marshes in wetlands, highly permeable sands on coastal plains, or changing dunes on islands. Extensive inventories are being made on each unit to determine their characteristics, distribution, and their capability to sustain human and natural impact and still function as a resource.

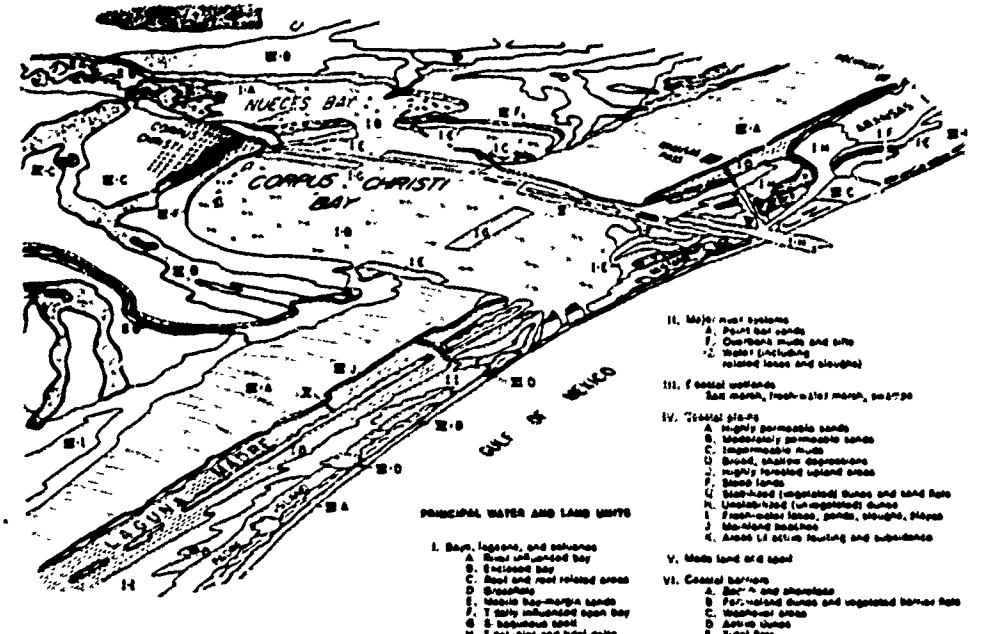
In this study, the team defines characteristics that may limit the use of the unit's environmental entities—land, water, or living animals and plants—as well as the activities that may or may not harm the units and their organisms. Once the limitations of these units are known, the effects of changes can be evaluated.

Water needs and waste residuals

Massive amounts of data are available to the research team concerning the amount of water used by municipal, industrial, and agricultural operations in the Coastal Bend region. Because industries in Texas operate on a permit system for discharge of waste, the State has reasonably good information on both water uses and waste disposals. For instance, from data concerning chemical and allied industries and refining plants in the Corpus area, models can provide projections of the increased pollutant loads associated with economic development, and can also help the economists predict the costs of alternative methods of waste treatment to meet various water quality standards.

Dispersion of water and materials

A key question at this point is what happens to waste residuals once they enter the estuarine environment? To determine this, a task force is modeling the hydraulic system within the Corpus Christi Bay, subject to tides and river flows. By verifying the tidal action of the hydrodynamic model with that of the estuary itself, and computing factors such as wind speeds and direction, freshwater inflow, and evaporation rate of the water, the research team has established a model that can determine spatial distribution of wastes discharged into the estuary. Water quality models are now being developed to simulate the trans-



Environmental capability units. The land around Corpus Christi Bay has been separated into 34 distinct categories, each of which will respond differently to similar environmental stresses.

port and reactions of phosphorus, biochemical oxygen demand, dissolved oxygen, algal growth, and the nitrogen cycle, which is a considerably more involved model because there are four forms of nitrogen with a distinct reaction for each. The models for each are interrelated and form in total a limited ecological model.

Biological use

The life systems of coastal flora and fauna organisms and their interactions are difficult to model, even to describe. The task force approached this job by focusing on 20 biotopes, or communities of typical gulf coast organisms, in terms of their location in the bays, temperature and salinity of water, food preferences, and other factors. The area was surveyed by aerial photography and by ground inspection, and the biotopes were subsequently identified and described through listings of major species of living organisms and physical surroundings.

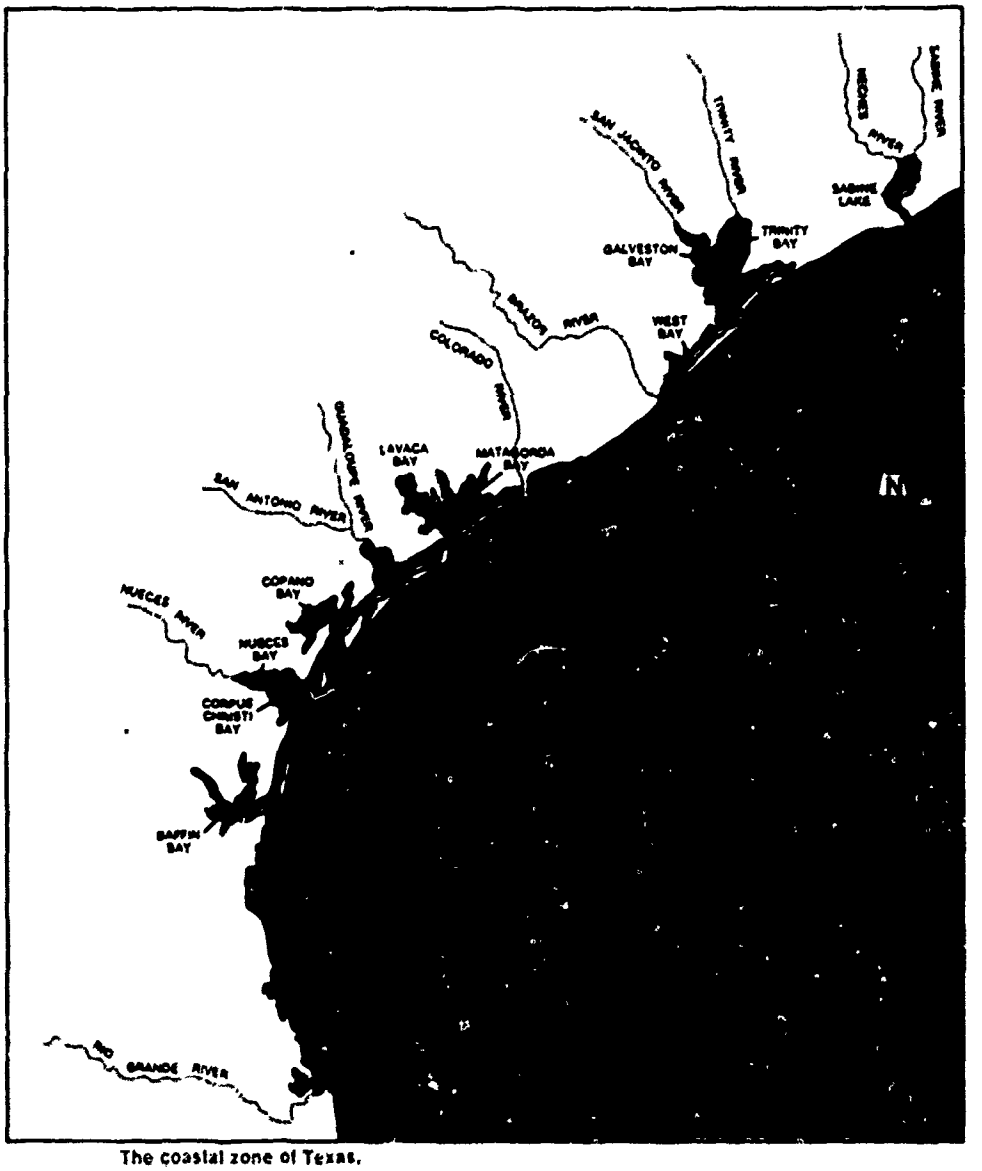
Within water, biological communities can withstand enormous variations in the natural environment. For instance, during a rain or flood, in-flow of fresh water to the bay may be as much as 100,000 cubic feet per second, with salinity as low as 5 to 10 parts per thousand. In dry hot periods, evaporation can exceed freshwater inflows which can drop to almost zero—low enough so that saline gulf water may enter the area, and salinity may rise as high as 40 parts per thousand. By knowing these natural variations, researchers can judge how much manmade variations marine organisms can stand.

To demonstrate how these biological use criteria work, an environmental impact statement was organized to illustrate change due to a coastal development project. For the experiment, a proposed development to enlarge the Harbor Island port facilities to a deepwater port to accommodate vessels up to 300,000 tons was selected. An environmental impact matrix was developed to show effects of construction, dredging, oil storage, spoil banks, and other activities.

Interrelations between task forces

The task forces are related through the project's series of models. For example, the land use economics task force might be interested in the effect on the coastal zone of construction of a new refinery on the north side of Corpus Christi Bay. Their projections would include population increases and distribution and some measure of the economic impact of the refinery. The resource capability unit group can narrow the possible development sites by pointing out places where the land—because of soil instability, ground water problems, or potential hazards from storms—can't sustain the development. The water needs group can then tell how much additional fresh water this development will require at that point, and how much additional waste loadings will result. The estuarine model group can predict the resulting changes in the bays from differences in natural water flows and transportation and distribution of the wastes, as well as their reactions in the water. The biological use group, knowing how the estuarine environment will be changed, will predict changes in the assemblages of living things in the coastal zone, including any potential economic effects on estuarine-based industries. The end result of such an exercise is an estimate of the economic impact of the development on the region and a description of associated environmental impacts. Decision-making beyond that is in the public policy arena.

One of the eager customers for the kind of research Fruh's team and others at Texas universities are doing is the Governor's Division of Planning Coordination. Joe Harris of that office says he's looking forward to the applications of the Corpus Christi model. "We expect to apply the findings and methodology of the Corpus study to the remaining four estuaries along the Texas coast, and to use it as a resource management model throughout the State," he says. And because Harris' office provides assistance concerning land use planning to many local government offices, the research materials incorporated into State publications find widespread use fairly quickly.



The coastal zone of Texas.

DELAWARE ESTUARY

Situated in the densely populated megalopolis between Washington and New York City, the Delaware River and estuary supply water for some 20 million people—nearly one-tenth of the population of the United States; serve the largest concentration of oil refineries on the east coast; and is the second largest seaport in the United States (New York is the first). Even so, the estuary contains some of the last few remaining tidal and freshwater marshes along the upper east coast; and in terms of fish, shrimp, clams, and oysters, it is one of the most productive coastal regions in North America.

Conflicts over uses of this area are intense and complex. Users share the river in loose, ill-defined interrelationships, with traditions and laws regarding

property and occupation leading back to colonial days. Except for the Delaware River Basin Commission (a Federal-interstate agency with responsibility for the estuary), little united effort and regulation has been made for the entire bay and borderlands. Even though there is cooperative spirit among the many individual users of the bay, there has been lack of overall organization, direction, and methodology.

To help remedy this situation, the Delaware coastal zone project has been undertaken by three main participating institutions from the estuary's three border States—the University of Delaware's College of Marine Studies, the Academy of Natural Sciences in Philadelphia, and Rutgers University of New Jersey.

Their area of investigation extends from the mouth of the estuary at Cape May and Cape Henlopen to the head of the tidewater at Trenton. This includes some 6,000 square miles of borderlands composed of densely populated and industrialized areas toward the north, and undeveloped marshland and tidal flats toward the south. A potentially intensified conflict exists between a rapidly spreading urbanization and a strong public desire to preserve the environmental character of the bay.

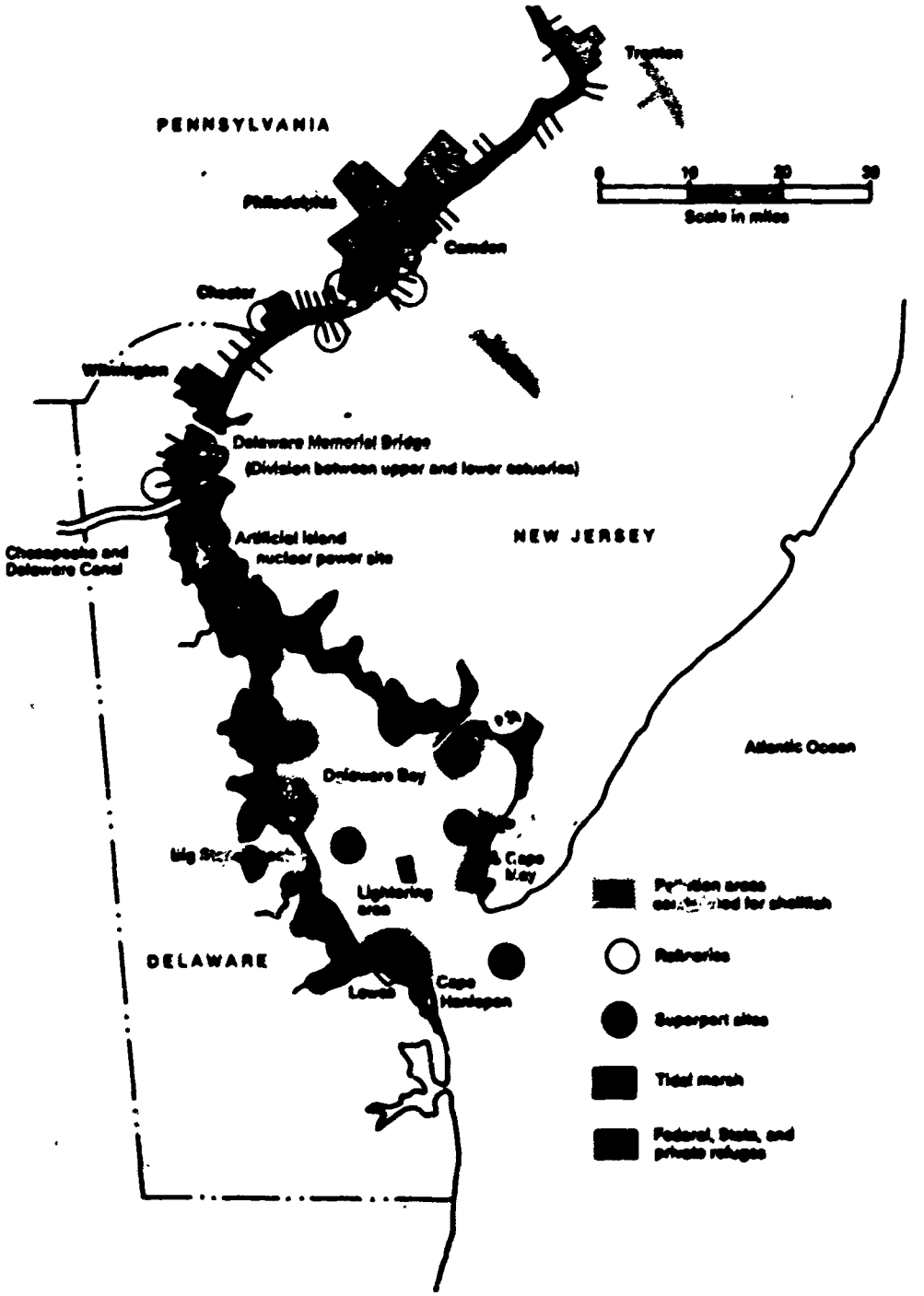
To identify major problems and knowledge gaps, a special environmental consultant's survey was taken of key managers and users of the bay, including government agencies; fisheries; chemical, oil, and electric companies; and conservation and civic groups. About 500 interrelated problems were identified from this survey concerning pollution, land development, river regulation, plant siting, and other activities. These problem areas have been sorted by the research team into four areas: estuarine biology, hydrodynamics and chemistry of the estuary, economic and social aspects, and pollution.

Estuarine biology and hydrology

The marshes, salt- and freshwater flats, and the aquatic life they support are some of the bay's most important assets. Most of the marshes in the upper estuary have been polluted and filled over by the intense and haphazard development of industry, commerce, and metropolitan areas in the past 50 to 100 years. The lower estuary wetlands remain largely undeveloped, protected in Federal, State, and private wildlife refuges along the Delaware shore, and under State and private ownership in New Jersey. The lower estuary still retains important biological resources, although commercial fisheries of both finfish and shellfish have declined greatly in output in recent years.

The research teams are compiling maps to show vegetation, topography, stream movements, and human activities along the estuary shores.

At ground level, samples of vegetation, sediment, and pond and estuarine water are taken. Small planes fly over th area, recording pollution outlets, river currents, ship traffic, and dredging operations. At 60,000 feet, specially equipped Navy RB–57 reconnaissance planes and a U–2 plane fly on special days to photograph the area. NASA's Earth Resources Satellite takes photographs as it passes over the Delmarva Peninsula every 18 days. Series of green band photos detect phenomena such as changing turbidity, sedimentation, and salinity in the bay's water. Red and near-infrared photos detect differences in the land surface temperatures and texture and in vegetation. Sequences of these photos clearly define areas of deteriorating wetlands showing encroachment of land developments and landfill operations, with resulting destruction of the natural habitat. These photos are adding to the data being gathered on hydrology and current systems of the bay in determining sediment flow, as well as pollution plumes from city sewer plants, industrial waste outlets, and oil leaks. The team has access to voluminous data on natural processes of tidal ebb and flow, temperatures, salinity; on meteorological factors such as wind speeds and direction, precipitation and storms; and on manmade activities such as channel dredging and installation of structures. An effective system of handling these data is being organized.



Delaware Bay. This map shows the location of possible superport sites in the lower estuary, which is still relatively undeveloped in comparison with the upper part.

Tomorrow's development

The Delaware Bay region is faced with tremendous future growth: The population of 6.4 million in 1960 is expected to rise to 11.9 million in 2020, while electric power generation will increase 18 times. The pollution load will rise from 18 million p.e. (population equivalent, which is the average amount of waste contributed by one individual each day, measured in terms of biochemical oxygen demand) to 200 million p.e. in 2020. Models are being devised to investigate the

Oil on water. The upper Delaware River estuary has the largest concentration of oil refineries on the east coast.

consequences of these projected urbanization factors and of alternative policies in terms of water pollution, increased water demand, and increased need for waterfront land. Models will also investigate the biological effects of projected water quality changes, the transport of pollutants, and toxicity to organisms. The assimilative capacity and susceptibility of marshes to increased amounts of pollution are under investigation for future modeling.

Polluting the estuary

Pollution into the estuary is one of the greatest problems, points out William Gaither, Dean of the College of Marine Studies at the University of Delaware, and one of the project co-directors. Although parts of the estuary are seriously affected by pollution, there is remarkably little information as to just where the loads originate, what effects they have on biological communities and water quality, and what changes will occur with future urbanization and industrialization. Major sources of pollutants are in the upper estuary, from Trenton to Wilmington, but indications show the whole bay is threatened. Researchers are finding that unrecorded pollution in forms of urban runoff and seepage may constitute as much as two-thirds of the organic pollution found in the water.

The major cargo on the river is petroleum, and the prime concern facing the bay at this time is its safe transport. Nearly 70 percent of all oil delivered to the east coast moves through the bay to the refinery complex north of the Chesapeake and Delaware Canal. Oil pollution of the upper estuary is already serious and becoming worse because of negligence in transferring oil from ships, in pumping out bilges, and from highway and parking lot runoff. Since the early 1960's, a new activity called lightering has sprung up off Big Stone Beach, Delaware, 12 miles up-bay from Cape Henlopen. Here crude oil is transferred from deep draft tankers to shallow draft barges so that the tankers are light enough to proceed up the channel. Although surveillance of traffic has been stepped up to prevent collisions, and no major spills have yet occurred, legislators and citizens' groups are pressing for stronger controls.

Delaware Bay is unique along the entire Atlantic coast because it possesses the only naturally sheltered deep harbor in close proximity to refineries and industrial markets. In answer to the need for a deepwater port on the east coast to accommodate heavy supertankers, sites are being considered within the lower bay— although many people oppose such a port with its potential impact upon the marshlands and environment.

The research team recognizes the growing pressures for economic development of the land, and also the benefit of striking a balance between controlled growth and preservation of the natural resources of the estuarine water and land.

"It is realistic to assume the Delaware Basin will continue to be developed mainly for human purposes with preservation of aquatic species an important but secondary objective," said the coinvestigators, William Gaither, Ruth Patrick, and William Whipple, in a recent report. "Yet it is also essential to maintain an unpolluted environment."

[From the Sierra Club Bulletin, Feb. 1973]

THE NEW TIDE OF COASTAL LEGISLATION

(By Norman Sanders)

The coastal areas of the U.S. are under attack as never before. As our population grows and our per capita consumption rises, our society places more and more stress upon all our resources. However, it is the very limited area of the coastal zone that bears the brunt of the assault. Oil production, pollution or filling of bays, harbors and estuaries, construction of hotels, apartments, and second homes have taken their toll. Unfortunately, control over these projects is usually vested in local governments who find it next to impossible to turn down any scheme which will "broaden the tax base."

In the struggle to halt overdevelopment of America's coasts, 1972 was a significant year. On October 28, President Nixon signed the federal Coastal Zone Management Act and on November 7, voters in the states of California and Washington passed coastal initiatives put on the ballot by citizen petition drives. These bills had all been under consideration for years, but by 1972, the problems had become so apparent that the people demanded action.

Increasingly, citizen action is forcing national, state and local governments to coordinate coastal development on a regional basis, planning for the maximum beneficial use of all coastal resources. Government and business traditionally have cooperated in the hasty exploitation of coastal areas for short-term financial advantage. The battle to change this situation is intense, because the oil, land-development, and utility industries, among others, depend on present loose controls for rapid return on their investments.

The federal Coastal Zone Management Act uses a system of rewards, rather than punishment, to attain proper management of the coastal resource. If the act receives the necessary funds, states will be offered grants to assist in developing a coastal management program. Once that program is established, additional federal money will be available to help administer the program.

Specifically, the states must develop "a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the coastal state . . . setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone." In addition, legal means must be established to regulate land and water use and control coastal development.

Whether or not the federal act works depends heavily on the willingness of the individual states to come to grips with coastal land-use problems. Many states have yielded to citizen demands to the extent of passing laws to protect coastal wetlands, but basically ignore other lands adjacent to the coast. Such states include Connecticut, Georgia, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, and North Carolina. Delaware has legislation that bans new heavy industry and port facilities from the coastal zone, but does not cover subdivisions, commercial developments or intensive recreational facilities. Hawaii, the first state to institute a statewide land-use program, requires a building permit only within a 20- to 40-foot setback from high tide mark, a zone that environmentalists consider too narrow for effective coastal land-use control.

In 1969, Minnesota passed a law requiring all counties to enact land-use control ordinances for all shorelands in unincorporated areas. The counties administer the act, with the state exercising only limited control. Oregon gives the public unrestricted use of beaches to the vegetation line, but coastal controls inland from that point are only now being considered. Rhode Island passed an act in 1971 establishing a 17-member coastal management council, but the state's quite strict controls covering management of wetlands are offset by weak land-use provisions that do not cover subdivisions, private-home construction, and some types of industrial development. Wisconsin's Water Resources Act is intended to protect the shorelines of inland lakes, and an

inventory of Lake Michigan's coast has already been prepared. Observers report, however, that many inadequacies have developed in the enforcement apparatus.

Until November 7, 1972, all the above states had stronger coastal legislation than did California, even though the Sierra Club and other environmental groups had long been fighting to obtain the needed legislation. But the opposition had been too powerful, so the situation had degenerated to the point where only about 263 miles of California's 1,072-mile coastline were legally accessible to the general public. Finally, on election day, the people corrected this situation by passing a coastal protection law themselves, using the initiative process to bypass the foot-dragging legislature.

California's successful Coastal Zone Conservation Act—called Proposition 20 on the ballot—is a direct descendant of the series of bills that environmental organizations had been trying to have passed by the state legislature for several years. Shepherded principally by Assemblyman Alan Sieroty of Beverly Hills and helped along by Sierra Club lobbyist John Zierold and Janet Adams of the Coastal Alliance, the bills had cleared the Assembly only to be stalled repeatedly in hostile Senate committees.

John Berthelson, a reporter for the *Sacramento Bee*, found out why the bills kept dying. A group called the "Committee Opposed to Ecology Issues" had been meeting for several years and had as its main goal the blockage of coastal legislation. The committee consisted of 34 industry lobbyists, including representatives of Southern California Edison Company, Standard Oil, the California Real Estate Association, and various other organizations who benefit financially from poorly controlled coastal land use.

The California Coastal Alliance, directed by Janet Adams, was the umbrella group that served as a coordinating agency for the efforts of the Sierra Club and some 60 other California environmental organizations during both the legislative and initiative campaigns. The Sierra Club itself declared passage of strong coastal legislation to be a primary goal for 1972.

Realizing in the spring of 1972 that the coastal bill would again die in committee, the Sierra Club and the Coastal Alliance decided to go directly to the people. California is fortunate in having a constitutional provision that gives voters the opportunity to pass their own laws, circumventing the normal legislative process. In order to qualify a proposition on the ballot, it is necessary to obtain petition signatures from ten percent of the state's registered voters. The first petition fell short of the required number of valid signatures, but the Coastal Alliance obtained enough additional names during an extension of the filing period to qualify for the ballot. The volunteers who circulated the petition collected a staggering total of 408,815 signatures during the drive.

When a spot on the ballot was assured, the forces that had opposed coastal legislation in Sacramento swung into action to defeat the initiative. The usual coalition of oil companies, developers, utility companies, and others with a vested interest in coastal profits hired the San Francisco political public relations firm of Whitaker and Baxter to conduct a "No on 20" campaign. Whitaker and Baxter was still flushed with its victory in the June primary when it scared California voters into voting against another environmental initiative, Proposition 9, the Clean Environment Act. The firm reported spending $2.4 million of its clients' money on billboards, newspaper ads and saturation radio and television messages, which hammered away at the themes of unemployment, power blackouts and insect plagues if Proposition 9 passed.

Whitaker and Baxter, promised a similar war chest for Proposition 20, started to work, their main goal being to confuse voters over the actual provisions of the bill. They bought hundreds of billboards and bus posters which screamed: "Don't let them lock up your coast. Vote No on 20" and "Conservation Yes, Confiscation No. Vote No on 20." Radio and television commercials, with sounds of waves and pictures of unspoiled coastlines, urged voters to preserve the coast by voting against the evil Proposition 20.

To further muddy the issue, Clem Whitaker prompted an acquaintance, Newton Cope, to file a lawsuit alleging that Cope's nightclub on the Sacramento River would be adversely affected by Proposition 20. He and his coplaintiff, who had property on the San Joaquin River, claimed the bill's language was so vague that not only would coastal areas be involved, but vast inland areas along rivers as well. They asked that Proposition 20 be taken off the ballot until the wording had been changed to explain the far-reaching con-

sequences they alleged. A judge hastily signed an order to show cause why Proposition 20 shouldn't be removed from the ballot, a move which newspapers favorable to the "No on 20" camp immediately interpreted as "Proposition 20 Off Ballot" in headlines.

Proposition 20 proponents got their day in court, however, and defused this phony issue. Arguing against the Whitaker and Baxter position were a battery of lawyers from the Sierra Club, the Coastal Alliance, the League of Women Voters, the California secretary of state's office, and other governmental agencies. The judge heard arguments about the true definitions of the coastal zone and the public's right to be allowed to vote on vital issues, and after deliberating overnight, finally decided in favor of the initiative's supporters. Despite their loss in court, the "No on 20" forces kept stating in advertising that the coastal zone extended many miles inland.

Whitaker and Baxter probably lost their campaign through overkill. Even Governor Reagan, longtime foe of coastal legislation, stated that the "No on 20" campaign was misleading. An assembly committee held hearings on the situation, and the media editorialized against the Whitaker and Baxter tactics. Newspapers, television and radio generally favored Proposition 20, in contract to the earlier Proposition 9 campaign, when they were hostile or neutral. They realized the need for meaningful legislation and couldn't help noting the underdog position of the Proposition 20 proponents.

Supporters of the proposition were short on money, but long on ideas. Whitaker and Baxter couldn't buy the type of coverage that State Senator James Mills generated on his bicycle ride down the coast from San Francisco to San Diego. Senator Mills and his band of cyclists (whose numbers from time to time varied from about 40 to several hundred) were very visible Proposition 20 supporters. The opponents generally kept a very low profile, letting their money talk through Whitaker anl Baxter. One exception was a letter urging defeat of the Coastal Initiative sent out by Southern California Edison Company to its millions of customers.

Because of lack of funds, supporters of Proposition 20 waited until the last few days before the election to advertise their position. Whitaker and Baxter had succeeded in confusing the voters, but the proponents had several advantages. For one thing, California law requires that lists of campaign contributions be made public before the election. This information showed who the opposition was and the vast sums they were spending. Whitaker and Baxter's final financial report showed expenditures of over $1,100,000, made up of contributions such as $50,000 apiece from land developers Deane and Deane, Inc., and the Irvine Company. Standard Oil Company gave $30,000, Bechtel Corporation (a major contracting firm) donated $25,000, and the Union Oil Company added $10,000 to the "No on 20" fund.

Proponents used this information to continually point out the opposition of the well-financed corporations to legislation that would benefit the public. A typical effective newspaper advertisement read: "The Sierra Club supports Proposition 20 . . . Signal Oil opposes. You can tell a proposition by the company it keeps." Ads also named other endorsers of the bill, including the League of Women Voters, the California Medical Association, the Federation of Western Outdoor Clubs, the United Auto Workers Union, the American Institute of Architects, Common Cause, the American Association of University Women, and many others.

Sierra Club lawyers persuaded the FCC to order radio and television stations to give proponents free time to offset Whitaker and Baxter's saturation advertising. Doris Day, Charlton Heston and Lloyd Bridges donated their services to make tapes urging voters to approve Proposition 20. Many candidates for office also urged passage of Proposition 20 in their campaign speeches. On November 7, voters demonstrated that they had seen through the Whitaker and Baxter smokescreen by passing Proposition 20 by a margin of 55 percent to 45 percent.

Proposition 20, which implements regional land-use planning in the coastal zone of California, will remain in effect from 1973 to 1976, during which time a plan for the coast will be produced. This plan will then be presented to the state legislatures for approval. In the interim, the proposition sets up a permit procedure to oversee coastal development until the plan is complete, thus taking control over coastal land-use away from local governments, much to their dismay.

The coastal zone is defined as the area between the outer limit of state jurisdiction three miles offshore and a line connecting the high points of the nearest mountain range. In some areas where the mountain range is distant—as in Los Angeles, for example—the act imposes an artificial boundary. The permit zone, however, covers only that portion of the coastal zone from three miles offshore to 1,000 yards inland from the high tide line. Since the permits cover offshore oil drilling activity, oil company opposition to the bill is understandable.

Coastal commissions, monitor the operation of the act. The 15 coastal counties are divided into six regional districts, each of which has a commission of 12 members. Six of the members are public and six are representatives of local government, elected by local governmental bodies themselves. The public members are appointed as follows: two by the governor, two by the speaker of the Assembly, and two by the Senate Rules Committee. The system looks unwieldly, and it is, but it is an attempt to break the hammerlock that industry has had on appointments handed out by the governor alone. In addition to the regional commissions, a state commission exists to oversee the operation, including the actual planning process. The state commission also has 12 members, six public appointees and six delegates elected by the regional commissions.

Coastal Alliance victory celebrations didn't last long after the election. While the citizens were congratulating themselves on a job well done, the "No on 20" group was lining up its appointees to the commissions. Lobbying was intense in the state capital and local government offices. The Standard Oil Company prepared a blacklist of well-known environmentalists who would be unwelcome to them as public members on commissions. They also presented another collection of names more to their liking—for example, university professors who had worked as consultants for the oil companies and utilities.

The Los Angeles City Council set the tone for local government Councilman Louis Nowell, an outspoken enemy of Proposition 20, to the regional commission. *The Los Angeles Times* responded with an outraged editorial and environmentalists immediately set out to defeat Nowell in the 1973 city elections. The time is passing when local governments can operate in a self-created vacuum.

These "last hurrahs" for the vested interests took place on other parts of the coast. In Santa Barbara County, the lame-duck board of supervisors elected Supervisor Curtis Tunnell to the regional commission. Tunnell, who also opposed the proposition, represents the smallest area of Santa Barbara coastline, and is himself a building contractor. When he was elected to the commission, developers, contractors and representatives of the Southern California Edison Company actually cheered and applauded in the board's meeting room. They normally work behind the scenes, but came out in the open after seeing the handwriting on the wall. The 1973 board of supervisors won't be under their control in Santa Barbara County because the people elected two new representatives on November 7, both environmentally oriented and pledged to support Proposition 20.

California's Proposition 20 campaign built upon itself with a positive feedback effect. As the issue became widely publicized, people started taking more interest in what was happening to their own surroundings. They got involved not only in the Proposition 20 battle, but also in local election issues. This increasing public interest swept environmentalists into a number of county and city offices in many parts of the state. These new, responsible members of local government, backed by the people and armed with legislation such as the Coastal Zone Conservation Act, can do much to halt the rapid deterioration of California's quality of life.

Residents of Washington state also got fed up with the inaction of their legislators and decided to do something about it. During the period from 1967 to 1970, six bills had died in the capital at Olympia. Environmentalists, led by the Sierra Club and the Washington Environmental Council, had fought hard in 1970 for the passage of a seacoast management act, only to see their efforts defeated by concentrated pressure from county and port commissioners, real-estate developers, and the Association of Washington Business. The developers weren't adamantly opposed to all legislation, as they were in California, but instead wanted a weak law that would subvert a 1969 court decision by the Supreme Court of Washington state. The court had

ruled in the case of *Wilbour vs. Gallagher* that the public's right to use the surface of state waters can be restricted or regulated only as a result of legislative planning for the shorelines of navigable waters. Without such a law, the court said, filling within state waters and over-water construction was effectively prohibited.

The net result of the 1970 special session tug-of-war in the Washington legislature was a resolution to refer the Seacoast Management Act to the legislative council for development of a bill for the 1971 meeting. Meanwhile, environmentalists were preparing an attack on another front. Along with California and a number of other states, Washington offers voters the opportunity to institute their own legislation through the initiative process. The Washington Environmental Council set out to get the 112,000 valid signatures required by October 1, 1971. Called "Initiative Measure No. 43," the official title of the petition was "Regulating shoreline use and development." In an effort to hamper signature gathering, shopping centers soon prohibited petitioners from operating on their premises. The environmentalists took the case to court and got a temporary restraining order from the Federal District Court that kept shopping center owners from interfering with the right to petition guaranteed by the U.S. Constitution.

By the last week of December, 1971, over 160,000 registered voters had signed the petitions for shoreline management regulations. Attention now shifted to the state legislature. Under the law, they had three options: Enact I–43 without change; do nothing, in which case I–43 would automatically be submitted to the people for a vote; or enact a substitute law on the same subject. The lawmakers, choosing the third alternative, enacted alternate No. 43B, a bill somewhat stronger than 1970 versions, but still less desirable environmentally than I–43. It was now up to a vote of the people in the November, 1972, elections to decide whether they wanted 43, 43B, or nothing at all.

House Bill 584, the official designation of 43B, became effective on June 1, 1971, and like any incumbent had an advantage on the ballot. The 1972 campaign shaped up with the environmentalists supporting I–43 and the developers boosting 43B. The developers felt that 43B was stricter than they liked, but feared the consequences of the *Wilbour vs. Gallagher* decision. In addition, 43B kept control of permits in the hands of local government, which the developers felt they could satisfactorily influence.

I–43 and 43B shared a number of very significant points. Both bills assumed that the shorelines of Washington must be protected from needless, selfish, or thoughtless destruction. Both bills also required comprehensive planning for shoreline areas and established a permit system to authorize conforming developments. They also prohibited highrise buildings over 35 feet along the shoreline without a permit, prohibited oil drilling in Puget Sound, imposed restraints on clear-cutting of timber along the shorelines and gave citizens the right to bring class actions in damage suits.

Compared to the high-pressure Proposition 20 campaign in California, the I–43, 43B controversy was almost gentlemanly. Few billboards appeared, and although debate was heated, the media were not saturated with ads. The battle resolved itself into the classical confrontation between supporters of regional control and proponents of the local-government status quo. The Sierra Club, the Washington Environmental Council, the Initiative 43 Committee under Tom Wimmer's chairmanship, and the *Seattle Post Intelligencer* lined up behind 43. Industry, labor, local government and the *Seattle Times* supported 43B. On election day, the voters joined the latter.

Even though the people selected 43B over I–43, environmentalists were not discouraged. As Tom Wimmer pointed out, "Initiative 43 was one of the major pressure tactics forced upon the legislature. It has served its purpose." Washington state now has more comprehensive controls over its coastline than any state in the U.S. Not only are its ocean areas controlled, as in California, but also all lakes over 20 acres in size and all streams of more than 20 cubic-feet-per-second flow. All developments within 200 feet of these bodies of water come under the act. The machinery is there. Now, with the momentum gained in the election, environmentalists are going to make it work.

Citizens in other parts of the country can build upon the California and Washington experiences in protecting their own coastal resources. The federal

Coastal Zone Management Act of 1972 will give impetus to their efforts to expand wetlands management to the entire coastal management programs. The land developers, oil companies, utilities and other vested interests are powerful, but not invincible. Average citizens, armed with the determination to defend the environment, can win.

[From the National Observer, Oct. 20, 1973]

Residents Believe the Government Has Broken Its Promise—The Ocean Gnaws at the Nation's Seashores

(By Lawrence Mosher, Cape Hatteras, N.C.)

Two decades ago the head of the National Park Service promised the natives of this wind-swept sand bar protection from an encroaching sea. Now the Government wants to renege, and the people of Hatteras are scared.

"We're used to water," says Mrs. Barbara Gray, a quiet-spoken brunette who has lived here all her life. "But we're not used to being washed out!"

Hatteras' problems stem from the fickleness of both nature and man. The rate of rise of sea level on the Atlantic Coast has increased sharply since 1930, a phenomenon caused by land subsidence as well as glacial melting. This rising sea level, combined with the unusually strong winds and currents that continuously tear at the Outer Banks, is causing these fragile barrier islands to erode faster than before.

FACING THE ATLANTIC

Yet since 1930 man has entrenched himself here even more daringly. The native population, now at a peak 3,225, has existed on the Outer Banks since the early 1700's. The people providently built their villages on the westward or lee, side of the islands. But now motels, restaurants, and summer cottages defiantly face the Atlantic, and a few already have disappeared under its ceaseless pounding.

The irony here is that the National Park Service, whose mandate was to keep the coastline "a primitive wilderness," is partly responsible for inducing the development that now is in jeopardy. Indeed, Park Service officials now assert that unless they stop fighting the ocean, the barrier islands are in danger of disappearing altogether. This, in turn, has led the Park Service to propose a new national policy that also would affect its six other national seashores from Massachusetts to California and its Indiana Dunes National Lakeshore.

The Park Service established Cape Hatteras Seashore in 1954. It extends down the Outer Banks for 75 miles, embracing all of Hatteras and Ocracoke Islands except for eight villages. To induce the natives, some officials and politicians made promises that the Government now wants to forget.

On October 31, 1952, Conrad L. Wirth, then the director of the Park Service, published "A Letter to the People of the Outer Banks," which pledged the villages protection from the sea as part of the bargain. "The National Park Service," declared Wirth, "intends to resume the sand-fixation work that it started in the 1930's and more firmly establish the dunes."

Wirth was referring to sand dunes built by the Depression-era Civilian Conservation Corps. A 1944 hurricane knocked some of the dunes flat. But in 1957 the Park Service began to rebuild and strengthen the dunes, employing bulldozers, fences, and grass seed. As the battle progressed, the Park Service resorted to expensive beach "nourishment" programs and a familiar last-ditch stand tool—sand bags.

CONVINCING STORMS

Three particularly nasty storms last winter finally convinced the Park Service its efforts were futile. The February-March storms washed away $500,000 of sand that had just been implanted on the beleaguered beach at Buxton, the main Hatteras village.

The storms also washed away entire units of several motels, including one owned by Hatteras' outspoken county commissioner, Bill Dillon. Dillon has long championed Hatteras' quarrel with the Park Service over how to hold back the ocean. Dillon contends that Park Service mismanagement has caused the increased erosion. He says he has campaigned futilely for the construction of groins (structures built perpendicular to the beach and jutting into the ocean) and a plan to sink surplus Liberty ships offshore to build a new beach. The Park Service considers both schemes "esthetically unfeasible."

It is the Park Service's refusal to build groins that galls some of the natives most. In 1969 the Navy constructed three groins at its facility here next to the Cape Hatteras Lighthouse. They are the only groins on the island and they appear to be working. Dillon calls the refusal "Park Service hypocrisy," although the Park Service opposed the Navy for 23 months on the groin issue.

WESTWARD SHIFT

Since 1957 the Park Service has spent more than $10 million to fight erosion at Hatteras. It has just finished another beach-nourishment project at Buxton that cost $2.7 million. More than one million cubic yards of sand were shifted hydraulically through a 24-inch pipe that extended 21,000 feet. If the Park Service gets its way, this will be the last such national seashore project.

The Park Service now says the best way to manage such barrier islands as Hatteras, is to leave them alone. A consultant, Dr. Robert Dolan of the University of Virginia's environmental-sciences department, theorizes that during periods of rapid sea-level rise, barrier islands can survive only if they are nourished by "oceanic overwash."

Dolan says the Outer Banks have gradually shifted westward as storm-propelled oceanic surges wash over the islands, chipping sand from their eastern fringes and depositing sand on their western shores. Thus anything that interferes with the overwash, such as artificially high dunes, acts to destroy the islands by increasing wave erosion and preventing the deposit of sand westward.

To many of the islanders all this only represents an unacceptable prophecy of doom. "Dolan's overwash theory is hogwash," snorts Dillon. Buxton Civic Association President Jack Gray refuses to accept the Park Service's scientific evidence. This is the recent discovery of peat beds on Buxton's beach.

NO MOVEMENT

Carbon-14 tests indicate the peat beds are from 400 to 600 years old, reports Neil Thorne, the acting seashore superintendent here. Peat grows only in the marshy areas of barrier islands, which always occur on their lee or mainland side. Despite this evidence of westward shift, Gray prefers "old nautical charts" that he says "show no movement."

The islanders' main fear is possible loss of the paved, two-lane highway that connects them to the outside world. The highway has had to be moved leeward several times following severe storms. The prediction here is that if the Park Service gives up fighting the sea, future storms will gouge new inlets that will permanently cut the road. School children will suffer, they say, because the island has only one consolidated school, which is at Buxton.

"We are not saying we should abandon the islands to nature," says a senior Interior Department official, Dr. Richard Curry. "Rather, we only want to abandon certain approaches to fighting nature. The money spent so far has had a zero return, while producing an element of false security and additional development."

OTHER SEASHORES

The emerging new Park Service policy has strong implications for the country's other national seashores. These are at Cape Lookout, N.C.; Assateague Island, which is in both Virginia and Maryland; Fire Island, N.Y.; Cape Cod, Mass.; Padre Island, Texas; and Point Reyes, Calif. The Park Service is now establishing a new national seashore at Cumberland Island, Ga., and runs the Indiana Dunes National Lakeshore.

Some of these are undeveloped, such as Padre Island and Assateague Island. Others are well developed, such as Cape Cod and Fire Island. Severe erosion is not a problem at Cape Cod, but it is becoming a problem at Fire Island, whose beaches are still privately owned. At Assateague Island, state laws require the future construction of a road and overnight accommodations. The Park Service's proposed back-to-nature policy would encourage Virginia and Maryland to amend those laws.

As for Cape Hatteras, the Park Service is now preparing a proposal to Congress to divert $1.1 million, or nearly all of its remaining unspent beach-stabilization funds, to the state of North Carolina "to develop transportation alternatives" for the islands. Gov. James E. Holshouser says the state has "an obligation" to keep the Outer Banks highway open. But the mood of anger and bitterness here against the Park Service has not been alleviated.

A LAND GRAB

Islanders refer to the original national-seashore acquisition as a "land grab." "The Park Service says Wirth's 1952 statement is not legally binding," adds Dillon. "But I think they have a moral obligation. The problem with the Park Service is that they don't care about people. We're just a nuisance to them."

But if the islands' future is to be decided according to how most people use them, then the islanders' prospects may not be bright. "The recreational value won't change," says the Park Service's acting chief scientist, Dr. Theodore W. Sudia, in referring to the back-to-nature policy change. "There were 1,783,737 visitors to Cape Hatteras National Seashore last year, and most of them camped. This is what the people seem to want."

[From Science, July 6, 1973]

THE COASTAL CHALLENGE

(By Douglas L. Inman and Richard M. Brush [1])

Fragile ribbons which border our land require more understanding, new technology, and resolute planning.

The shoreline is the unique boundary separating the earth's three domains: the land, the sea, and the atmosphere. It is one of man's oldest frontiers and one of his most informative paleo-oceanographical tablets. The nearshore and estuarine waters exert a predominate influence in the everyday affairs of man. Although the continental shelves and nearshore waters comprise only about 5 percent of the area of the world, about two-thirds of the world's population lives near the coast. This imbalance has its roots in antiquity for mankind's first freeways were the seas which, once oars and sails appeared, became the means of bypassing the rigors of overland travel. Sailors traditionally have sought the comparative safety of the open sea in preference to the hostility of the shores' dangerous shoals, strong and unexpected currents, and destructive breaking waves.

To the casual observer, the coastlines of the world look craggy and indomitable, the rocky stretches seem tough, and the beaches appear to be permanent. But the sand on the beaches is easily moved and is in increasingly short supply. In reality, then, the beaches are fragile ribbons of sand that are frequently broken by acts of nature and man. The waters that bathe them have a limited flushing capacity, and yet they have become the most common depository for mankind's wastes (Fig. 1).

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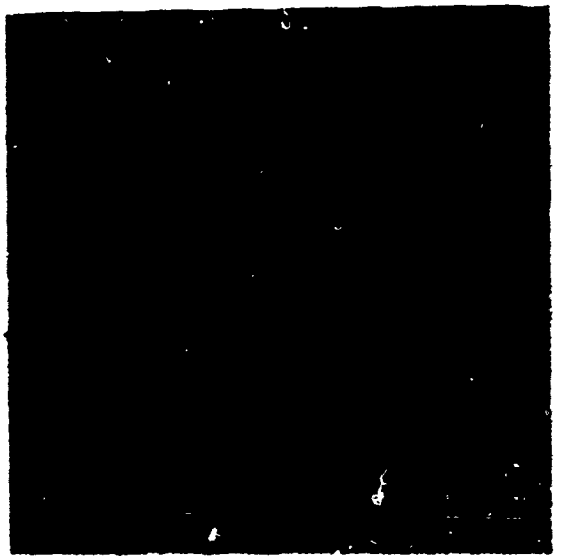
[1] Dr. Inman is professor of oceanography and Mr. Brush is a senior development engineer; boh authors are affiliated with Scripps Institution of Oceanography, University of California, La Jolla 92037. This article is based on a talk entitled "Degradation of the coastal environment" that was presented 9 December 1970 at the San Francisco meeting of the American Geophysical Union.



Pictorially and esthetically diverse as they may be, the coastal and nearshore zones of the world all share common dynamic experiences (Fig. 2). Here, shore processes begin the mixing, sorting, and transportation of sediments and of runoff from land. Waves, winds, and currents mold the shorelines of the world, and their interaction with the land and its runoff determines the configuration of coastlines and the adjacent bathymetry.

Man's rapidly expanding use of the ocean and his increasing incursion into it commonly involve processes that take place in shallow water. These same shallow waters are experiencing the bulk of the impact of waste discharges, thermal and radioactive pollution, dredging, coastal construction, mining and poaching.

THE COASTAL ZONE

The oceans and seas have a profound effect on the continents, exerting the controlling influence on weather and climate. Indeed, the sea completely dominates the environmental aspects of the land bordering it. In this connection it is useful to describe coastal areas in terms of a "coastal zone" and a "shore zone" (Fig. 3).

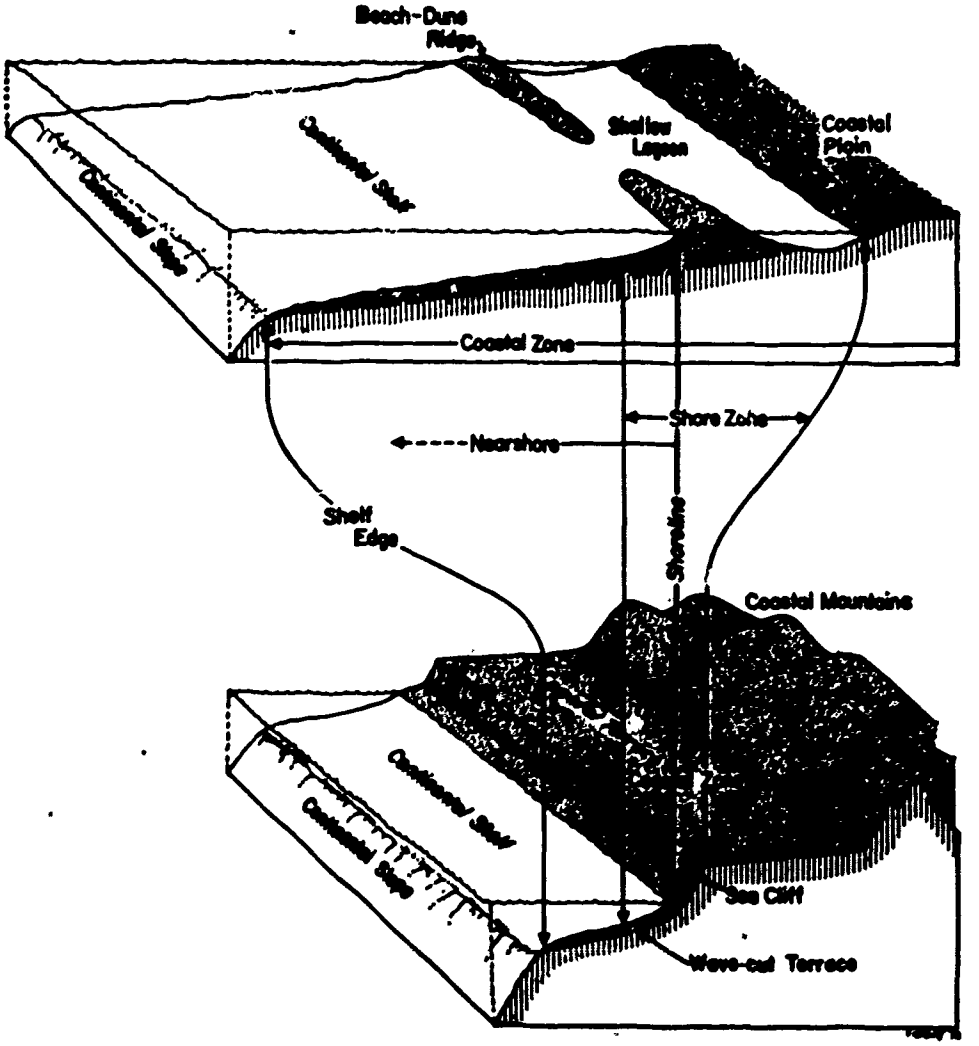


Fig. 3. Definition sketch for coastal zone nomenclature. The type of coast is related to its relative position on the moving plates of the tectosphere; wide-shelf plains coasts (upper part) and narrow-shelf mountainous coasts (lower part) are characteristic of the east coast (trailing edge) and west coast (collision edge) of the Americas, respectively. [After Inman and Nordstrom (*1*)] [Courtesy of the University of Chicago Press, Chicago, Illinois]

The coastal zone may be defined in terms of the large-scale tectonic and erosional-depositional features which have lengths along the coastline of the order of 1000 kilometers and widths extending from the coastal plain out into the water of an order of magnitude less. The coastal zone is composed of the coastal plain, the continental shelf, and the waters that cover the shelf; it also includes other major features such as large bays, estuaries, lagoons, coastal dune fields, river estuaries, and deltas.

The shore zone is the sedimentary and solid surface associated directly with the interaction of waves and wave-induced currents on the land and on the run-off products from the land. The shore zone includes the beach, the surf zone, and the nearshore waters where wave action moves bottom sediments. The shore zone extends landward to the sea cliffs that border the backshore of a beach, and, where wave-deposited structures such as barrier islands and spits are narrow, across these features to the cliff or coastal plains bordering shallow lagoons. All bodies of water have "shore zones," the extent and configuration of which depend upon the length and height of the waves, the range of the tide, the degree of exposure to winds, and the size of the wave-deposited structures. As a practical concept, the waters involved in the coastal zone may be considered to include the shallow seas and waters covering all the continental shelves of the world which total an area of 29×10^6 km^2, or about 8 percent of the surface area of the world oceans. The nearshore waters are bounded on the landward side by shorelines that total about 440,000 km in length (*1*) and on the seaward side by the break in slope at the shelf edge, which marks the change from the relatively horizontal shelf to the steeper continental slope. The continental slope marks the topographical and structured edge of the continents and is the boundary between relatively shallow water covering the shelf and the great depths of the true oceans. The continental slopes, one of the striking geographic features of the earth, have a combined length of about 150,000 km (*1*).

Conventionally, the depth of the shelf edge is taken as about 200 meters (100 fathoms), although in some localities the depth may be as great as 400 m. On a worldwide basis, the average depth of the shelf edge is about 130 m. The width of the shelf ranges from nearly zero to more than 1300 km and averages about 74 km (*2*).

Because of the mutual interdependence of processes in the coastal and nearshore zones, it is difficult to decide where to begin a discussion of the processes that affect the shore. One can break into this circle by asking: What are the important shore processes, and what coastal factors affect them? In a very general sense, the important factors are: (i) the degree of exposure to waves and currents, (ii) the supply of sediment and runoff to the coast, (iii) the topography of the continental shelf and the adjacent coast, (iv) the tidal range and intensity of the current, and (v) the coastal climate.

Coastal climate is principally dependent upon latitude and the location of the major ocean current and wind systems; the topography of the shelves and coast are closely associated with the geologic setting of the coasts and the origin of the adjacent ocean basins (*1*). The potential of man's intervention becomes apparent when one compares the physical processes operative in nearshore waters and the natural balance of energy that drives them with man's requirements in terms of usage and waste disposal.

PHYSICAL PROCESSES IN NEARSHORE WATERS

The important processes that operate in the nearshore waters of oceans, bays, and lakes are similar. They differ in intensity and scale, variables which are determined by the energy in the waves and in the physical dimensions of the surf zone. Moreover, it is becoming increasingly clear that processes in nearshore waters are driven by basic, interrelated forces that are systematic and essentially regular in form. These systematic driving forces lead in turn to the development of coherent processes such as the nearshore circulation cells (Fig. 2) and the longshore transport of sand that are basically similar the world over.

Most of the energy for these processes comes from the sea (Fig. 4). It is translated by the stress from winds which blow over the ocean and generate waves of many sizes and frequencies. It is produced by the gravitational attraction of the moon and sun acting on the mass of the ocean. It is transmitted by various, sometimes impulsive, disturbances at the boundaries of the ocean with the atmosphere and with the sea bottom, which generate additional waves of other sizes and frequencies. These waves travel across the ocean with little loss of energy, until the configuration of the landmass and of the adjacent shelves and the slope of the bottom direct and focus the waves for their final assault on the coast. Straight, gently sloping shores accept energy uniformly, whereas headlands, points, and peninsulas tend to attract and concentrate energy.

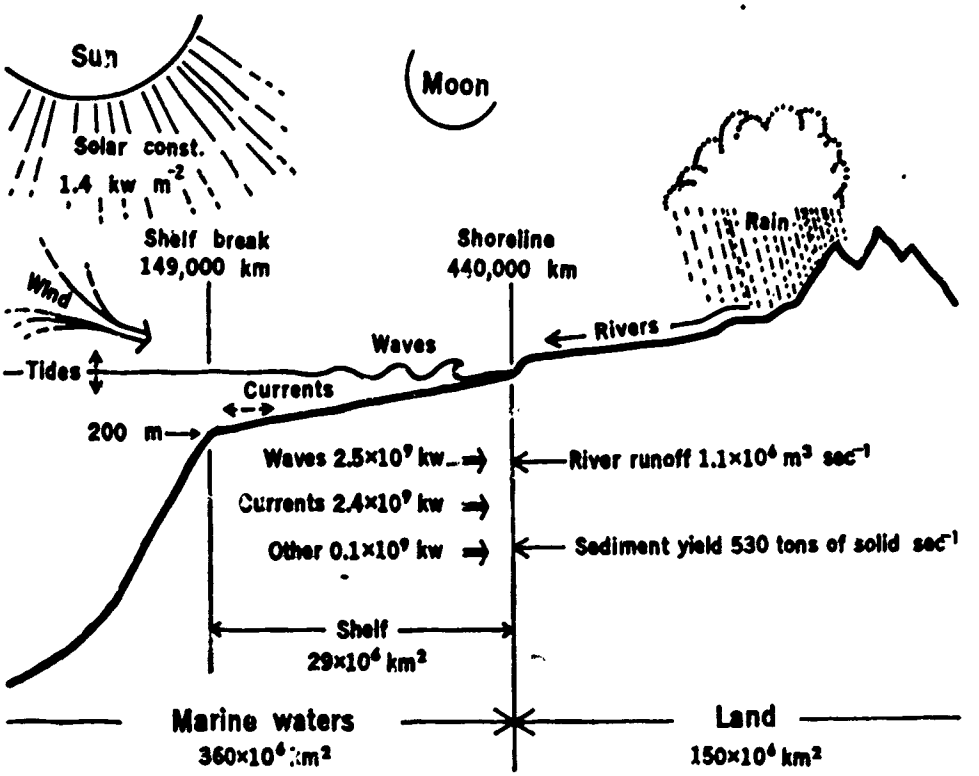


Fig. 4. Budget of energy and land runoff in the coastal zone. Most of the energy comes from the open sea.

The energy available to nearshore waters is dissipated in various ways, including the reflection of waves, the generation of turbulence and currents, the transportation of sediment, and the formation of other kinds of waves. Some energy appears to become "trapped" against the coast rather than reflected, thus leading to a higher energy level at the coast. The trapped energy may take the form of edge waves (3), which are special modes of surface waves that travel along the coast, or long-period resonant oscillations called "shelf seiche."

CIRCULATION CELLS AND MIXING

The many forms of energy flux and the high rates of energy dissipation over the shelf and in the surf zone further complicate processes within the nearshore environment. Although in deep water the mutual interaction of waves is relatively weak, in shallow water the interaction of waves with other waves, of waves with currents, and of currents and waves with the bottom can produce strong interchanges of energy. For example, the waves in shallow water produce bottom-boundary currents flowing in the direction of wave propagation, and these currents play a significant role in the transport of sediments over the shelf (4). Pressure fields produced by waves traveling in shallow water change the

average water level, reducing it near the breaker zone and increasing it where the waves run up the beach face (5).

The interaction of surface waves moving toward the beach with edge waves traveling along the shore produces alternate zones of high and low waves that determine the position of rip currents (Fig. 2). The pattern that results from this flow takes the form of a horizontal eddy or cell, called the nearshore circulation cell (6, 7). The rip currents are the "freeways" across the surf zone for experienced surfers and the greatest cause of drownings for inexperienced swimmers.

The nearshore circulation system produces a continuous interchange between the waters of the surf zone and the waters of the offshore zone, acting as a distributing mechanism for nutrients and as a dispersing mechanism for land runoff. Offshore water is transported into the surf zone by breaking waves, and particulate matter is filtered out on the sand of the beach face. Runoff from land and pollutants introduced into the surf zone are carried along the shore and mixed with the offshore waters by the rip currents (8).

Two well-defined mechanisms dominate mixing processes in the surf zone; each has distinctive length and time scales determined by the intensity of the waves and the dimensions of the surf zone. The first process is associated with the breaking wave and its bore, which produce rapid mixing in both the onshore and offshore direction, alternatively. This mixing, when normalized and averaged over the surf zone width X_b, gives coefficients of eddy diffusivity of the order of $H_b X_b/T$, where H_b and T are, respectively, the breaker height and the period of the waves (Fig. 5). The second process is advective and is associated with the longshore and rip current systems in the nearshore circulation cell. A constant longshore discharge of water between cells Q_l gives a concentration N_n in the nth cell down-current (in the direction of current flow) from a continuously injected source of tracer of

$$N_n = N_o (Q_l/Q_m)^n \qquad (1)$$

where N_o is the concentration of tracer leaving the injection cell and Q_m is the maximum longshore discharge of tracer within a cell (Fig. 5). As an approximation, the concentration decreases exponentially with the distance y from the injection point when n is replaced by y/Y, where Y is the spacing between rip currents. This relation gives an apparent longshore eddy mixing coefficient of the order of $Y \cdot \nu_l$, where ν_l is the longshore current velocity. Along ocean beaches $H_b X_b/T$ and $Y \cdot \nu_l$ are about 10 and 100 m^2 sec^{-1}, respectively.

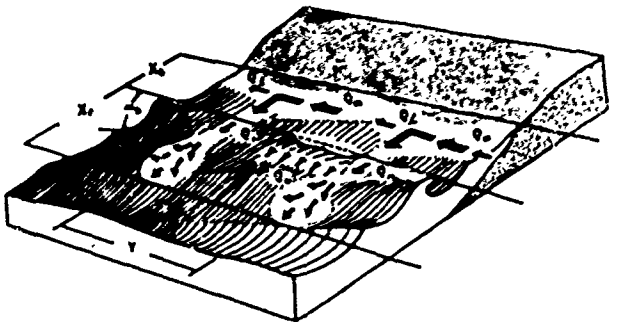


Fig. 5. Definition sketch of the model for mixing when waves break at angle α_b with the beach. The zone between rip currents constitutes a circulation cell; primary mixing occurring in the surf zone (area, $X_b \cdot Y$), and secondary mixing occurs in the offshore zone between the heads of the rip currents (area, $X_r \cdot Y$). The water discharges in volume per unit time are as follows: Q_l, from cell to cell; Q_m, maximum within a cell; Q_o, onshore transport associated with breaking waves; and Q_r, offshore flow in a rip current. [From Inman *et al.* (8)] [Courtesy of the *Journal of Geophysical Research*, Washington, D.C.]

Once the tracer front has passed through a particular cell, tracer is introduced into the adjacent offshore waters by the rip current. In the absence of coastal currents, the tracer remains in the offshore area where it is available for recirculation into the cell. Recirculation of tracer decreases the dilution capacity of the cell and causes the concentration to increase, as shown schematically in Fig. 6B. Thus the concentration becomes a function of both distance and time, and the simple equation for mixing (Eq. 1) no longer holds.

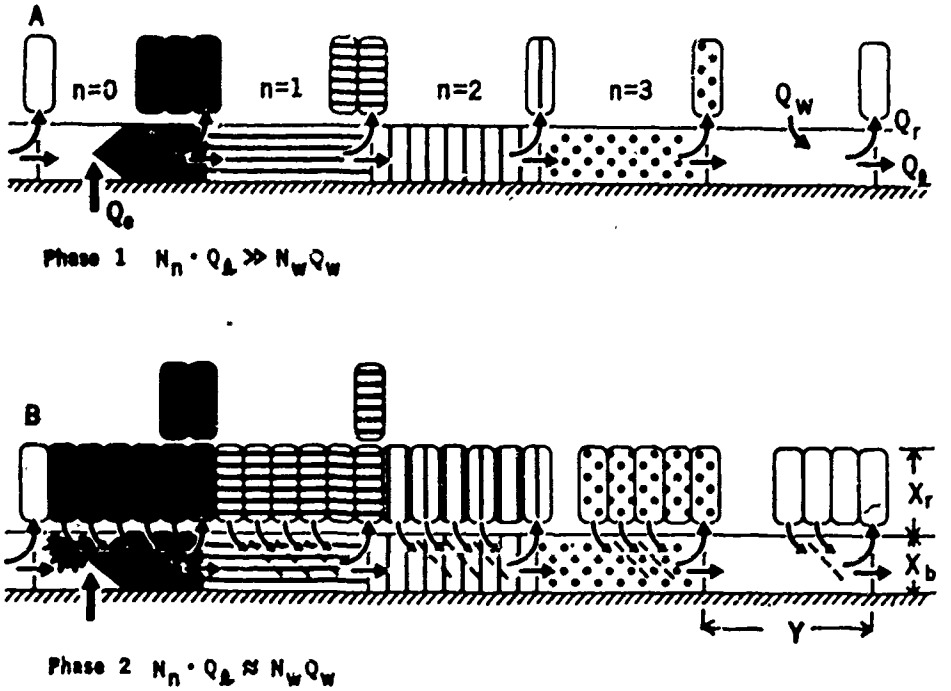


Fig. 6. Schematic diagram of the longshore mixing of tracer Q_e, continuously injected. (A) Phase 1 applies when recirculation from the secondary mixing zone is negligible; (B) phase 2 applies when the background concentration becomes significant and recirculation causes the system to become saturated. Symbols are defined in Fig. 5. [From Inman *et al.* (8)] [Courtesy of the *Journal of Geophysical Research*, Washington, D.C.]

The tracer tends to remain in the secondary mixing zone (area, $X_r \cdot Y$) because the rip currents move slowly down the coast with the longshore current. Thus the rip currents continue to flow seaward into tracer-free waters until the entire secondary mixing zone is filled with tracer of concentration N_n. A situation in which the secondary mixing zone is about half filled with tracer is shown by the extent of offshore discoloration in Fig. 7.

Fig. 7. Photograph showing phase 2 mixing and an increase in the offshore concentration by rip currents as shown by the plumes of discolored water. The discolored water is being recirculated, causing the mixing to approach saturation (see Fig. 6).

It is apparent from Fig. 6B that the presence of background concentrations of tracer in the offshore zone decreases the concentration gradient by recirculating material already there. This in turn leads to an expotential buildup of concentration until both the surf zone and the region offshore become saturated.

CIRCULATION OVER THE SHELF

Coastal circulation on a much larger scale but of reduced intensity occurs over the entire shelf. This circulation may take the form of eddies and countercurrents from the permanent ocean current systems that flow across the shelf; the circulation may be due to tidal currents or it may be induced locally by the wind in the form of the upwelling of deep water and the horizontal flow of water along the coast.

Coastal circulation cells of large dimension are also associated with the submarine canyons that cut across the shallow shelves of the world. These canyons act as deep, narrow conduits connecting the shallow waters of the shelf with deeper water offshore. At times, strong seaward flows of water occur in the canyons, so that they resemble large-scale rip currents. The canyon currents produce circulation cells having dimensions of the shelf width and spacing comparable to that between the submarine canyons (Fig. 8). These strong currents in submarine canyons seem to be caused by a unique combination of air-sea-land interactions (*9*) consisting of the following: (i) a pileup of water along the shoreline caused by strong onshore winds; (ii) down-canyon pulses of water caused by the surf beat of the incident waves; (iii) a shelf seiche excited by the waves and by the pressure fluctuations in the wind field; and, finally, (iv) the formation of steady down-canyon currents as the weight of the sediment suspended by the currents overcomes the density stratification of the deeper water.

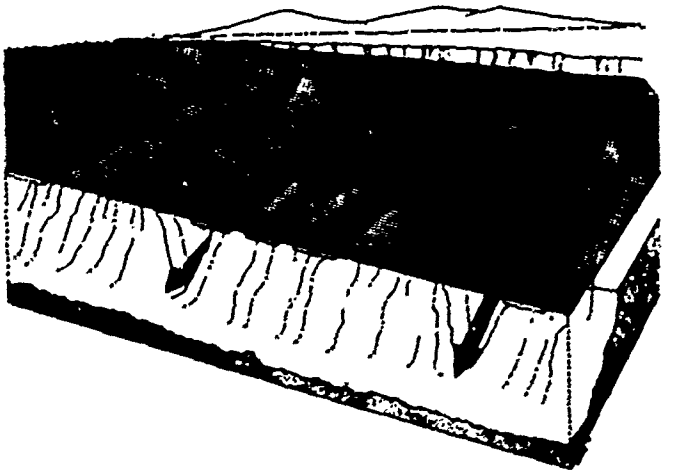


Fig. 8. Circulation over narrow shelves is markedly influenced by submarine canyons. Onshore winds produce an onshore flow of water at the surface with compensating seaward flow at the bottom. Strong winds and waves also produce offshore flow down submarine canyons.

There is less pileup of water by the wind over the canyon than over the adjacent shelf, and, as a result, the shallower waters over the shelf flow along the coast toward the canyons and, as in the case of rip currents, flow seaward over the canyons. The surf-beat waves (waves caused by the beat of incident waves of different frequency) and the shelf seiche are very long waves, whose interaction with the shelf and canyon produces current pulses capable of suspending sediment. When these pulses are of sufficient velocity to suspend sediment and to maintain a suspended load of sediment, autosuspension results and the pulsating current is converted into a self-maintaining turbidity current that travels down the canyon into the adjacent deep waters of the ocean (*9*).

LONGSHORE TRANSPORT OF SAND

Wherever there are waves and an adequate supply of sand (or coarser material), beaches form. The back-and-forth motion of waves in shallow water produces stresses on the bottom that place sand in motion. The interaction of the wave stresses with the bottom also induces a net boundary current flowing

in the direction of wave travel. Over a gently shoaling bed, the back-and-forth motion of sand in the presence of the boundary current produces a net transport of sand in the direction of wave travel. Thus, waves traveling toward the shore tend to contain sand against the shore, and eventually to produce a profile that is in equilibrium with the energy dissipation of the waves (*10*, *11*).

When waves approach the coast at an angle, they cause sand to be transported along the shore. For the special case of longshore transport of sand in the surf zone, the breaking wave supplies the power needed to place the sand in motion, as well as the longshore current that carries the sand load. The longshore transport of sand I, expressed in immersed weight (for example, newtons per second) is directly proportional to the onshore flux of longshore-directed energy P_l for example, watts per unit length of shoreline) such that:

$$I_l = KP_l \tag{2}$$

where K is a dimensionless constant with a value of 0.77 (*12*). Thus it is apparent that the longshore transport of sediment along a sandy coast can be estimated if the budget of wave energy (that is, the wave climate) is known.

Unfortunately, there are few localities for which the wave climate is quantitatively known, so that the volume of littoral transport along oceanic coasts is traditionally estimated from the rate of growth of spits (Fig. 9) (*13*), or from the observed rates of erosion or accretion, most often in the vicinity of coastal structures such as groins or jetties. In general, beaches build seaward up-current from obstructions and are eroded on the lee side of the current where the supply of sand is diminished. Such observations indicate that the rate of transport of sand varies from almost zero to several million cubic meters per year, with average values of 150,000 to 1,600,000 m^3 $year^{-1}$. Along the shores of smaller bodies of water, such as the Great Lakes, the littoral transport rate can be expected to range from about 1,000 to 150,000 m^3 $year^{-1}$ (*14*). In general, these are conservative estimates, since the volume of material moved commonly exceeds that indicated either by deposition or by erosion.

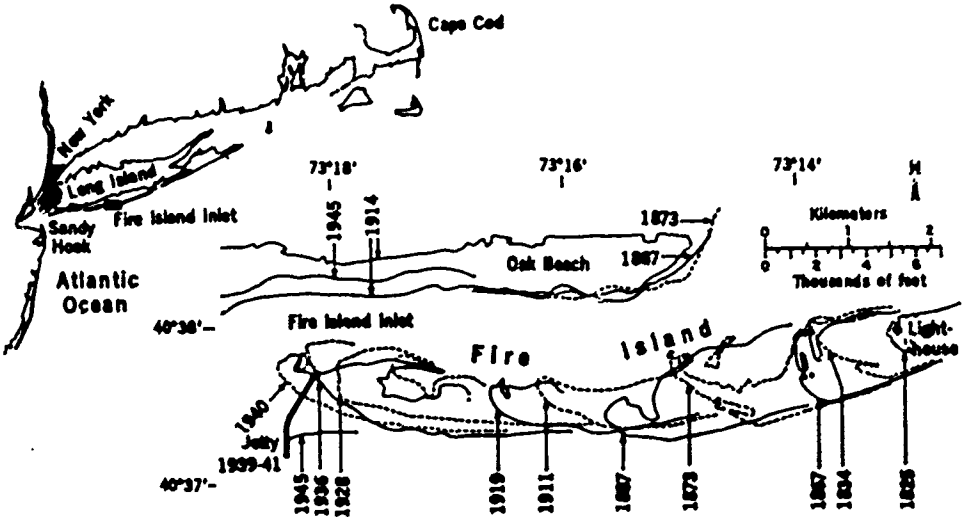


Fig. 9. Longshore sand transport has caused an extension of the Fire Island spit at an average rate of 100 m per year since 1825. [After S. Gofseyeff (*13*)] [Courtesy of J. W. Johnson, School of Engineering, University of California, Berkeley]

NATURAL BALANCE OF ENERGY AND SEDIMENT

The energy which drives processes in the nearshore zone comes from the sea and atmosphere. Waves and currents from the open ocean propogate toward coasts where they are concentrated and eventually dissipated. At the shoreline the breakers, storm surges, tides, and secular changes in sea level attain their greatest height.

The wind systems are the direct links between the atmosphere and the ocean, and, through momentum in exchange at the ocean's surface, transfer kinetic energy at the rate of about 10^{11} kilowatts ($1kw=10^{10}$ erg sec^{-1}) (*15*). Winds plus ocean and earth tides are directly or indirectly responsible for most of the energy dissipated in the nearshore zones of the oceans. The most common form of nearshore energy is that associated with the wind-generated surface waves.

A wave 3 m high transmits energy at the rate of 100 kw per meter of its crest line. Toward 1 km of coastline it transmits 100,000 kw. The power of such waves is equivalent to a solid line of automobiles, each 270 horsepower, advancing side by side at full throttle (*16*). On an oceanwide basis, wind-generated waves probably have an average height of about 1 m, and they transmit power at a rate of about 10 kw per meter of wave crest. If these waves were to break continuously along the 440,000 km of the world's shoreline, they would dissipate energy at the rate of 4.4×10^9 kw. This number is probably too high for a worldwide average dissipation of energy because all shorelines are not exposed to the open ocean. A reasonable estimate of the average rate of energy dissipation of surface waves in nearshore waters is about one-half to two-thirds of this amount, say 2.5×10^9 kw, which is equivalent to the energy production of 10,000 large power plants (Table 1).

Tides produce motion even in the deepest oceans. However, this motion is usually only a few centimeters per second so that tides dissipate very little of their energy on the deep sea bottom. The principal tidal dissipation results from the flow of strong tidal currents in shallow areas, such as the Bering Sea, the Okhotsk Sea, and the Argentine Shelf. About half of the tidal current dissipation occurs in five shallow seas having a total area of only 10 percent of the shelf area of the world. The total rate of energy dissipation by lunar and solar tides in the shallow waters of the world oceans is about 2.2×10^9 kw, or only slightly less than the rate from wave action (Table 1).

TABLE 1.—*Estimates of the natural rates of dissipation of mechanical energy in the shallow waters of the world (16) in units of 10^9 kw ($1 kw=10^{10}$ erg sec^{-1}).*

Source:	Rate
Wind-generated waves breaking against the shoreline (*39*)	2.5
Tidal currents in shallow seas (*40*)	2.2
Large-scale ocean currents in shallow seas (Guiana Current off the northeastern coast of South America, 0.13; Falkland Current over the Argentine Shelf, 0.03)	.2
All other sources (wind stress on the beach, 0.01; internal waves, 0.01; edge waves; shelf seiche; tsunamis; rivers entering the oceans)	.1
Total	5.0

By comparison with waves and tides, other sources contribute relatively little energy to coastal waters. For example, the most spectacular waves in the sea are tsunamis, which are well known because of the loss of life and great damage to coastal structures associated with their passage. However, large tsunamis with energy contents as high as 5×10^{25} joules occur only about five times per century (*17*). The average rate of energy dissipation of a tsunami is about 10^6 kw, which is four orders of magnitude less than the total for waves and tides.

The total rate of dissipation of mechanical energy in the shallow waters of the world is about 5×10^9 kw (Table 1). Dissipation by one process or

another occurs over the entire shelf (Fig. 4). The wind-generated surface waves dissipate their energy primarily nearshore, especially in the breaker zone, whereas tidal and other ocean currents and internal waves dissipate most of their energy over the outer portions of the shelf. Internal waves, edge waves, shelf seiche, and local winds may produce water motion over the continental shelf and submarine canyons. Thus, it is apparent that an understanding of processes in the nearshore environment requires a careful assessment of the amounts of energy in the various kinds and modes of wave and current motion as well as a determination of the mechanics of interaction of waves, currents, and sediments.

Beaches are composed of whatever clastic material is locally in greatest abundance. The principal sources of beach and nearshore sediments are as follows: the rivers, which bring large quantities of sand directly to the coast; the unconsolidated material of the sea cliffs, which is eroded by waves; and material of biological origin, such as shells, coral fragments, and skeletons of small marine organisms. Many beaches, such as those along the east coast of the United States, are supplied by sand that has been reworked by waves and currents from ancient river and glacial material deposited during former still-stands in sea level (*18*).

Streams and rivers are by far the most important source of sand for beaches in temperate latitudes. Cliff erosion probably does not account for more than about 5 percent of the material on most beaches, except locally on trailing-edge coasts such as the east coast of the United States. Wave erosion of rocky coasts is usually a slow process, even in cases where the rocks are relatively soft shales. On the other hand, erosion rates greater than 1 m year^{-1} are not uncommon in unconsolidated sea cliffs.

The contribution of sand by streams in arid countries is surprisingly high. This is so because arid weathering produces sand-size material and inhibits the growth of vegetation that would protect the land from erosion. Therefore, in an arid climate, occasional flash floods transport large volumes of sand. The maximum sediment yield occurs from drainage areas where the mean annual precipitation is about 30 centimeters (*19*).

Traditionally, geologists have estimated long-term erosion and deposition rates from the amount of material deposited during geologic time. Such estimates give erosion rates varying from about 1 to 4 cm per 10^3 years for drainage basins of moderate relief to as much as 21 to 100 cm per 10^3 years for the Himalayas (*20*). Assessment of the volume of sedimentary material on the continental United States and in its adjacent sea floors indicates that the average erosion rate of the United States during the past 600×10^6 years was 3 to 6 cm per 10^3 years (*21*).

An increasing number of measurements of river discharge have provided an independent estimate of contemporary erosion rates of the land. The average discharge of the world's rivers totals 1.1×10^6 m^3 of water per second. Measurements suggest that the average suspended plus bed load is about 480 milligrams per liter, which gives a total discharge of particulate solids of 530 metric ton sec^{-1} (Table 2) (metric units are used throughout this article except in column 1 of Table 3). This gives a contemporary average erosion rate of the land of about 6 cm per 10^3 years (*22*), which is somewhat higher than the average erosion rates estimated from deposition during geologic time. As we will show below, the increase in the erosion rate is probably associated with man's intervention.

TABLE 2.—*Estimate of the natural run-off of fresh water and solids from the continents into the coastal waters of the world (see Fig. 4).*

Source:	Rate
Discharge of water into the oceans from all rivers (*41*)	1.1×10^6 m^3 sec^{-1}.
Flux of dissolved solids (*42*)	125 ton sec^{-1}.
Flux of particulate solids (*43*)	530 ton sec^{-1}.
Average erosion rate of land (*22*)	6 cm per 10^3 years.

TABLE 3.—POTENTIAL FOR MAN'S INTERVENTION IN TERMS OF THE USE OF ENERGY AND THE DISPOSAL OF WASTE IN RECENT YEARS (1967–71). THE "EXTRAPOLATED WORLD VALUE" IS BASED ON PRESENT U.S. STANDARDS OF USE AND A POPULATION OF 200×10^6 EXTRAPOLATED TO A PRESENT WORLD POPULATION OF 3.5×10^9. HEAT UNITS ARE CONVERTED TO THEIR MECHANICAL EQUIVALENTS.

Item, location, source, and amount	U.S. per capita value (metric units)	U.S. doubling time (years)	World value extrapolated from U.S. standards (metric units)
POWER, UNITED STATES, 1968			
Total energy consumed, 62.5×10^{15} British thermal units (44).	10.4 kw	14–20	36.5×10^9 kw.
Electrical energy consumed, 1.33×10^{12} kilowatt-hours (44).	0.8 kw	9	2.7×10^9 kw.
Waste heat (coolant) from the generation of electrical energy (1.5 watts of coolant per watt distributed).	1.5 kw	8	5.3×10^9 kw.
SEWAGE			
Southern California, 10^7 people, 1968, 1.1×10^9 gallon day^{-1} (45).	416 liter day^{-1}		20×10^9 m^3 sec^{-1}.
New York City, 8×10^6 people, 1970, 1.3×10^9 gallon day^{-1} (46).	615 liter day^{-1}		
Solids from domestic sewars into coastal waters, 500×10^6 ton year^{-1} (47).	15 kg year^{-1}		
OIL			
Spillage into world oceans (27)		15	2.4×10^4 ton year^{-1}.
SOLID WASTE, UNITED STATES			
Collected per capita in 1967, 5.2 pound day^{-1} (44)	2.4 kg day^{-1}	10	97 ton sec^{-1}.
Dumped by barge into coastal waters, 1968, 62×10^6 ton year^{-1} (48).	320 kg year^{-1}	10	36 ton sec^{-1}.
DREDGE FILL, UNITED STATES, 1971			
Bypass, disposal, and maintenance, 3×10^8 cubic yards (49).	1.6 ton year^{-1}	4	172 ton sec^{-1}.
MINING OF SAND AND GRAVEL, 1970			
California, 23.5×10^6 U.S. tons (35)	1.1 ton year^{-1}		122 ton sec^{-1}.
Great Britain, dredged from the North Sea, 13×10^6 British tons (36).	260 kg year^{-1}	5	29 ton sec^{-1}.

It is of interest to compare the total fluxes of energy and sediments (particulate solids) into the coastal waters of the world. Since energy may be thought of as the ability to do work, the flux of energy associated with waves and currents gives some measure of their potential to transport sediment. For example, let us assume that the estimated total flux of wave energy (2.5×10^9 kw) is available for transporting sand along the world's coastline, and that the longshore-directed energy flux, P_l in Eq. 2, is equal to one-tenth of the incident energy flux. From Eq. 2 this gives a rate of immersed weight transport of 1.9×10^{11} newton sec^{-1}, which is equivalent to a (dry) mass transport of 3.1×10^7 ton sec^{-1} for the world's beaches, a mass flux 5.8×10^5 greater than that supplied to the coast by all of the erosion of the continents.

The budget of sediment for a region is obtained by assessing the sedimentary contributions and losses to the region, and their relation to the various sediment sources and transport mechanisms. However, it is not a simple matter to determine the budget of sediment, since such a calculation requires a knowledge of the rates of erosion and deposition as well as an understanding of the capacity of the various transport agents.

Studies of the budget of sediment show that coastal areas can be divided into a series of discrete sedimentation compartments called "littoral cells." Each cell contains a complete cycle of littoral transportation and sedimentation, including sources and sinks of sediment and transport paths (*11*).

Along the coast of Southern California (Fig 10), the principal sources of sediment for each littoral cell are the rivers, which periodically supply large quantities of sandy material to the coast. The sand is transported along the coast by waves and currents until the "river of sand" is intercepted by a submarine canyon, which diverts and channels the flow of sand into the adjacent submarine basins and depressions.

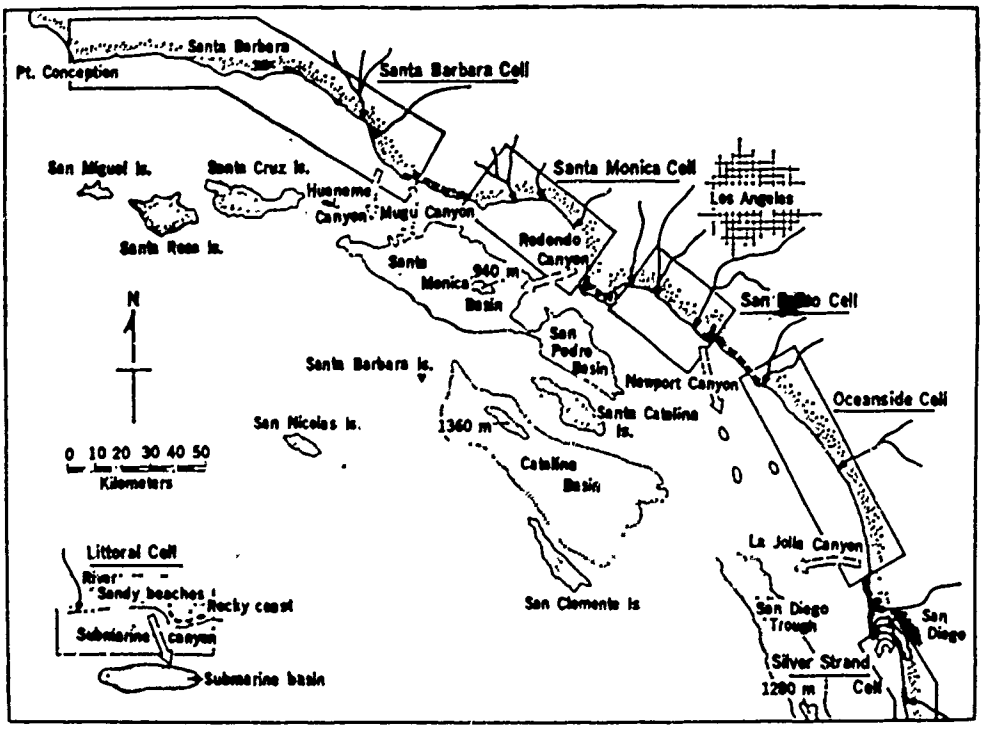


Fig. 10. Illustration of the five littoral cells along the Southern California coast. Each cell contains a complete sedimentation cycle. Most sand is brought to the coast by streams, carried along the shore by waves and currents, and lost into offshore basins by submarine canyons. [After Inman and Frautschy (*11*)]

There are five littoral cells in Southern California. Each cell begins with a stretch of rocky coast where the supply of sand is limited (Fig. 10). In a downcoast direction, determined by the prevailing waves, the beaches gradually become wider and the coastline straightens where the streams supply a sufficient amount of sand. Submarine canyons terminate the littoral cell by capturing the supply of sand, thus causing the next cell to begin with a rocky coast devoid of beaches.

The concept of littoral cells and their sedimentary budget applies to all coasts, the budget differing principally in the nature of the sources and sinks for the sediment. Along coasts having large estuaries such as the east and gulf coasts and portions of the Oregon coast, the river sand is trapped in the estuaries and cannot reach the open coast (*23*). For these coasts the sediment is produced by the erosion of sea cliffs and shelf sediments deposited at a lower stand of the sea, whereas the sinks are sand deposits that tend to close and fill the estuaries (Fig. 9).

THE EXTENT OF MAN'S INTERVENTION

The continental shelves are the sites of rich oil and mineral deposits, and the shallow waters covering them include much of the plant and animal life in the sea. Nearshore waters impinge on the beaches, harbors, and estuaries, where utilities, industry, recreation, and the human habitat compete for the water supply. Thus man's intervention takes three interrelated forms: (i) the impact of numbers of people, all competing in diverse and complex ways for portions of the coastal zone; (ii) the pollution and contamination of coastal waters; and (iii) the critical modification of the natural balance in the ecology of plants and animals and in the sources of sediments that constitute the world's beaches. This impact on the coastal zone is occurring not only in America but throughout the world, especially in the more technically advanced countries. Thus the problems that prevail along the coastlines of the United States are all present in various degrees along the coasts of the Black Sea, the North Sea, the Sea of Japan, the Mediterranean Sea, in fact, wherever man has access to the coast (*24*).

POPULATION

In terms of the present world population, the amount of shoreline is even now quite limited. If everyone in the world decided to spend some time along the 440,000 km of world shoreline, each person would have less than 113 cm of shoreline. Much of the shoreline would be in the Arctic and Antarctic regions, and there would be insufficient space for each person to stand and face the sea. In the State of California alone, there are approximately 500,000 pleasure craft registered, a sufficient number, at a length of 5 m per boat, to form a solid line twice the length of the coastline of the state. In recent years there has been an increase in migration toward the coastal zone. For example, California has increased in population from 6.9×10^6 in 1940 to 20×10^6 in 1970. Thus the population of California doubles every 14 years, whereas for the United States as a whole the population doubles every 50 years.

POLLUTION OF COASTAL WATERS

The coastal zone receives the bulk of man's wastes, and coastal waters are beginning to show this impact in terms of a degradation of water quality arising from the presence of numerous types of biological and chemical pollutants, thermal pollution, and acoustic pollution. Although the surf zone characteristically has high mixing rates (Fig. 6), this is not true of the shelf as a whole. Wind- and wave-induced surface currents tend to produce circulation patterns that favor the retention of particulate material near the coast (Fig. 8), whereas biological scavenging and absorption by suspended particles (both biogenous and inorganic) concentrate dissolved pollutants in coastal waters (*25*). For example, one can trace the plume of the Columbia River for nearly 400 km along the Oregon coast by measuring the ^{51}Cr in the surface waters (*26*); the spatial distribution of DDT [1,1,1-trichloro-2,2-bis(*p*-chlorophenyl)ethane] in zooplankton exhibits "hot spots" along the California coast from north of San Francisco to the Mexican border, and significant amounts for 600 km to Punta Eugenia in Baja California, Mexico (Fig. 11).

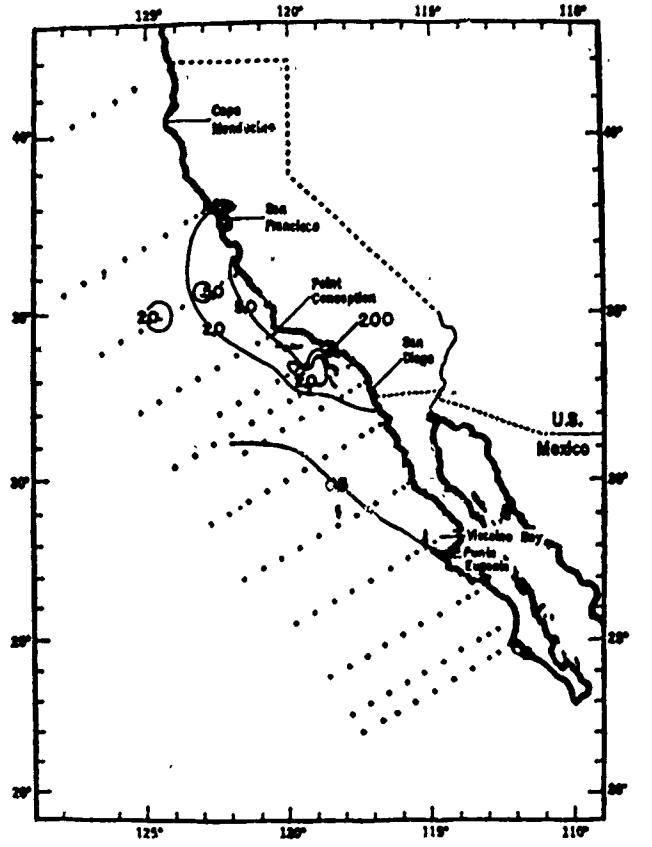


Fig. 11. Distribution of DDT and DDE [1,1-dichloro-2,2-bis(*p*-chlorophenyl)ethylene] in zooplankton (in units of 10^{-6} gram per cubic meter of surface water) along the coast of California and Baja California, Mexico, for 1969 (dots indicate sample locations). [From McClure and Barrett (*50*)] Since 99 percent of the DDT is absorbed on solid particulate material rather than in plankton, the total concentrations in seawater are approximately 100 times greater than shown here. [Courtesy of V. E. McClure and I. Barrett, National Marine Fisheries Service, La Jolla, California]

Major oil spills of various types and their conspicuously detrimental effects on beaches, marine organisms, and birds are now an everyday fact of life (*27*). The amount of spillage, presently 2.4×10^6 tons per year (Table 3), will inevitably increase in the future with the increasing consumption of oil and the introduction of supertankers having capacities of 2.5×10^5 tons nad drafts in excess of 24 m. Moreover, the new big tankers have fewer bulkheads than the smaller tankers and thus have a potentiality for greater spillage when disabled.

So much plastic has been disposed of in the oceans that this material is now the most common type of flotsam on the world oceans; plastic particles in quasi-stable concentrations of 3500 pieces per square kilometer are widespread in the Sargasso Sea (*28*). Since every body of water has preferential windward shores (the prevailing wind systems cause some shores to be preferred to others), their beaches ultimately become the trash dumps for the world's flotsam. It was once romantic to find treasure at the shore—a Japanese net float, a hatch cover for a fireside bench. Now the beaches are piled with an endless supply of "disposable" plastic containers.

Coastal waters are the principal recipient of sewage and of heat from power plants, both directly by marine outfalls and indirectly from rivers. This is particularly serious in regions where the population density is high. Inland waters arrive at coastal estuaries contaminated by diluents supporting floating solids and oils, chemical discards, mining tailings, and trash. Economic pressures on upstream communities often dictate a chain of relatively inefficient sewage "treatment" plants which remove only larger chunks, sparge chlorine gas into the mixture, and relay it downstream to the next community, and the next, until finally it arrives at the sea. Utilities and industries along the way avail themselves of water for heat exchangers, condensers, and extraction processes, thus rais-

ing the mean temperature of the water. It is estimated that, by the turn of the century, power-generating plans will produce roughly enough heat to raise by 20° C the total volume of water which runs over the surface of the United States (*29*).

Power plants operating on fossil fuel require the mechanical equivalent of 1.4 watts of waste heat (coolant) for each watt of electrical power generated, whereas nuclear power plants require about 2.1 watts of coolant for each watt of electrical power. The predicted power plant requirements for the California coast for 1980 are 37,000 megawatts. According to this estimate, coolant will be used at the rate of 1.2×10^{10} calories per second, and this is equivalent to the heating of a flow of about 15,000 m^3 of seawater per second by 1° C. This flow is equivalent to one-half of the estimated average flow over the California shelf, and is 10^{-4} of the total flow of the California Current, which is one of the ocean's permanent current systems (*30*).

Southern California with approximately 10×10^6 people discharges sewage into the Pacific Ocean at the rate of 48 m^3 sec^{-1}; New York City with 8×10^6 inhabitants discharges sewage into the Hudson Estuary and ultimately into the Atlantic Ocean at the rate of 57 m^3 sec^{-1} (Table 3). The sewage effluent is rich in nitrates and phosphates which locally may contribute to red tides, fish mortality, and the contamination of edible mollusks. However, more damaging in the long term is the introduction of an entire spectrum of organic and inorganic materials (*31*). Many of these are highly toxic and become concentrated in the organs of various fish and shellfish.

A critical fact frequently overlooked when one is considering the dispersion of pollutants in nearshore waters is that the effective rate of mixing depends both upon the mechanics of the phenomena (for example, turbulence in the breaking wave)and upon the concentration gradient of the pollutant that is being mixed (that is, the change in the concentration of the substance with distance). The concentration gradient is dependent upon the nature of the substance and its past history of dispersion in the area. The concentration gradient is particularly sensitive to the background concentration of the substance already present in the receiving waters. The presence of background concentrations decreases the effectiveness of the mixing process by recirculating material already there, and this in turn leads to an exponential buildup of concentration in the receiving waters. Thus the presence of background concentrations progressively leads to saturation and a complete breakdown in mixing even though the mechanical mixing mechanism remains undiminished. This effect is demonstrated in the comparison shown in Fig. 6, A and B, and in the coastal concentrations shown in Figs. 7 and 11.

CRITICAL MODIFICATION OF SHORELINES

Man's modification of the balance of sediment and his increasing depletion of the supply of sand to the beaches of the world has reached a critical state. On the one hand, man's use of the land has markedly increased the rate of erosion of the continents and increased the supply of sediment to rivers and streams. Paradoxically, the increasing construction of dams on most major streams results in the trapping and depositing of sediment behind the dams, thus shortening the life of the dam and intercepting the sediments that previously nourished the coasts and beaches. In this regard, the Aswan Dam on the Nile River is proving to be a major catastrophe.

The effect of dams on beaches is not always readily apparent. Erosion begins in the up-coast end of each sedimentation cell (Fig. 10) and progresses down the coast (Fig. 12). Most of the streams along the Southern California coast have dams and no longer supply sand to the coast. However, concurrent with the construction of dams, sand dredged from harbors and marinas has been placed on the beaches at approximately the same rate as sand supplied naturally by streams. For example, the Silver Strand littoral cell (Fig. 10), southern portion) has had no natural source of sediment since the Rodriquez Dam was completed in 1937. Silver Strand Beach has been maintained by artificially replacing 22×10^6 m^3 of sand in the period between 1941 and 1967.

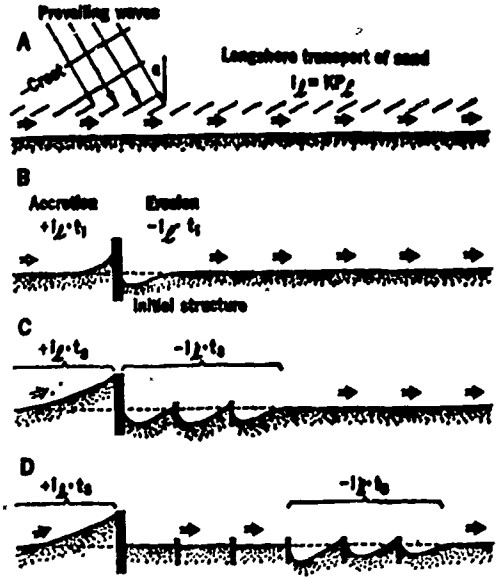


Fig. 12. Erosional chain reaction following the installation of a single coastal obstruction: (A) straight beach with prevailing waves producing a longshore transport of sand, I_l; (B) accretion and erosion showing initial obstruction; (C) downcoast erosion requiring two additional groins; and (D) continuation of the downcoast erosion requiring three more groins. Note that the first three groins are now unnecessary.

The mining of beach and dune sands has further depleted this source, and the entrapment of coastal material by harbors, groins, and jetties has seriously reduced the supply of sand on beaches where it serves to protect the coast from the erosive action of waves. Moreover, sand is a valuable recreational asset that is now in very short supply. It is a natural resource which, like forests, streams, and mountains, should be protected.

It is well known that some of the activities of man, especially agriculture, construction, and deforestation, have in many places increased the rates of erosion of land by nearly an order of magnitude above the natural rate (*32*). The estimates of natural erosion listed in Table 2 are undoubtedly influenced by this factor, for man's influence on erosion can be documented to pre-Christian eras (*33*). On a global basis, it would appear that the present yield of sediment from the continents may be about twice what it was before man's introduction of large-scale agricultural and constructional activities during the past century. The increased yield of sediment causes an anomalous situation with regard to the supply of beach sand from rivers. The effective life of a dam is shortened by the rapid fill of sediment, and the very existence of beaches is imperiled by the termination of their natural source of sand (*34*).

The mining of beach sand has become an important industry in many areas. During 1970, 21.3×10^6 tons of sand and gravel were mined from beaches, river beds, and coastal sand dunes in California (*35*) (Table 3). During the same year, 112×10^6 tons were mined in Great Britain, of which 13.2×10^6 tons were mined from offshore banks, many of which provide essential protection to the coastline from wave erosion (*36*). A classic example is the erosion of the village of Hallsands which occurred in 1894 after 500,000 tons of gravel had been removed from a bank just offshore from the village (*37*).

By far, the most dramatic coastal intervention occurs when man interrupts the longshore transport of sand by the construction of jetties, breakwaters, and

groins. Any artificial structure that produces a local accretion of sand by interrupting the transport of sand along a coast will cause, at least temporarily, a corresponding local erosion just down the coast from the area of accretion. Since the structure causes erosion to occur in a locality where erosion did not previously occur, or at a higher rate than occurred previously, a second structure is often needed to protect the new area of erosion. When built, this second structure in its turn causes erosion farther down the coast and a third structure is required to remedy this new situation, and so forth. Thus the construction of the first structure can set off a chain reaction that results in a requirement that the entire coastline be fronted by protective structures (Fig. 12).

The real "need" for a second or third structure may have been only temporary and may have diminished once the normal rate of longshore transport had been reestablished around the structure that caused the problem initially. However, if additional structures are built, the down-coast erosion becomes more severe with each succeeding structure, until finally a "point of no return" is reached where the need for additional protection from erosion becomes so urgent that the only choices are: (i) to continue to build protective works, (ii) to find a new source of beach sand, or (iii) possibly a combination of both.

From the foregoing it becomes apparent that the point of no return actually depends upon the longshore rate of transport of sand and the time needed to reestablish a normal transport rate around a structure. If a structure traps a large proportion of the total amount of sand transported longshore for a long period of time, the point of no return may be reached when only a single structure is built. On the other hand, it is possible to trap small amounts of sand at widely separated points along a coast provided that: (i) the total longshore transport rate is accurately known, so that the structure can be properly designed, and (ii) provisions are made to cope with the downcoast erosion until equilibrium in the longshore transport of sand is again established.

COMPARISON WITH NATURAL PHENOMENA

It is apparent that man's intervention in the coastal zone has both material and esthetic connotations. Almost all aspects of his impact on the environment are directly related to his numbers (the present population of the world is 3.5×10^9 people) and his relative affluence. An acceptable procedure for evaluating the extent and possible future consequences of man's intervention would be to assess his present intervention in the world's coastal zones and extrapolate these values to some future time, say, the year 2000, when it is estimated that the population will be 8×10^9 people. Unfortunately, the data are hopelessly inadequate except for a few of the advanced countries which constitute a small percentage of the population. Thus, an alternative, although less rigorous, procedure, becomes necessary. We will assume that the present world population extrapolated to present U.S. standards of living constitutes a useful guide to man's potential for intervention in the future. Although admittedly less rigorous, this criterion is based on known and well-documented values of population and standards of living, thus providing an inherent simplicity in the assumptions and arithmetic. Global values for man's possible interventions extrapolated to the present population from present U.S. standards, are shown in column 4 of Table 3.

It becomes readily apparent when Tables 1 and 2 are compared with Table 3 that man's intervention is indeed substantial. Man's extrapolated power consumption of 36.4×10^9 kw is over five times the total amount of natural energy dissipated in the shallow waters of the world, whereas the amount of waste heat (coolant) from electrical generators to be dissipated in the nearshore zone is slightly greater than the energy driving the dissipating mechanisms! It is more difficult to compare the effect of pollution of various types because the toxicity of the particular pollutant is not directly related to its volume or weight. However, the extrapolated volume of sewage effluent alone is 2 percent of all the discharge of the world's rivers. The extent of the distribution of DDT is dramatically illustrated in Fig. 11.

Man's solid waste disposal is much simpler to assess. Waste materials now cover significant portions of the sea floor adjacent to the large metropolitan areas. Recent surveys show that waste-containing deposits cover about 210 km^2 of New York Harbor and the adjacent continental shelf (38). The extrapolated value for the waste disposal in coastal waters is 7 percent of the total discharge

of solids from the world's rivers, whereas the extrapolated value for the bypassing of solid material by dredging is 32 percent of the world's supply of solids from land! Even more significant is the effect of the mining of sand and gravel, which would constitute 23 percent of the world's solids, when only about 10 percent of the solids supplied by rivers are in sand and gravel sizes, the remainder being silt and clay which is not suitable for beaches of building materials.

PLANNING CRITERIA

Our understanding of shore processes is still in a rudimentary stage, and it is not yet possible to describe many important phenomena and their interactions by rigorous theory. Only during the past 5 years or so have experiment and measurement progressed to the point where even general concepts can be formulated and tested. However, as this brief résumé of the physical processes shows, it is beginning to be possible to identify and to understand some of the mechanisms that are currently being studied, and to place what we do know in a planning context.

It has become evident with more intensive study that shorelines all over the world are subject to similar dynamic experiences. As a result, it will soon be possible to forecast the mixing ability of the waters over the shelf on a local regional basis. It will be possible to predict the longshore transport rate of sand, and to assay the effectiveness of various techniques for bypassing sand around coastal obstructions and harbors (Fig. 13). It is possible to estimate and pace man's intervention both in terms of utilization and waste. There is a desperate urgency associated with fitting these components into a coherent planning effort: the impact is harsh and frighteningly nonlinear, and the need is great right now!

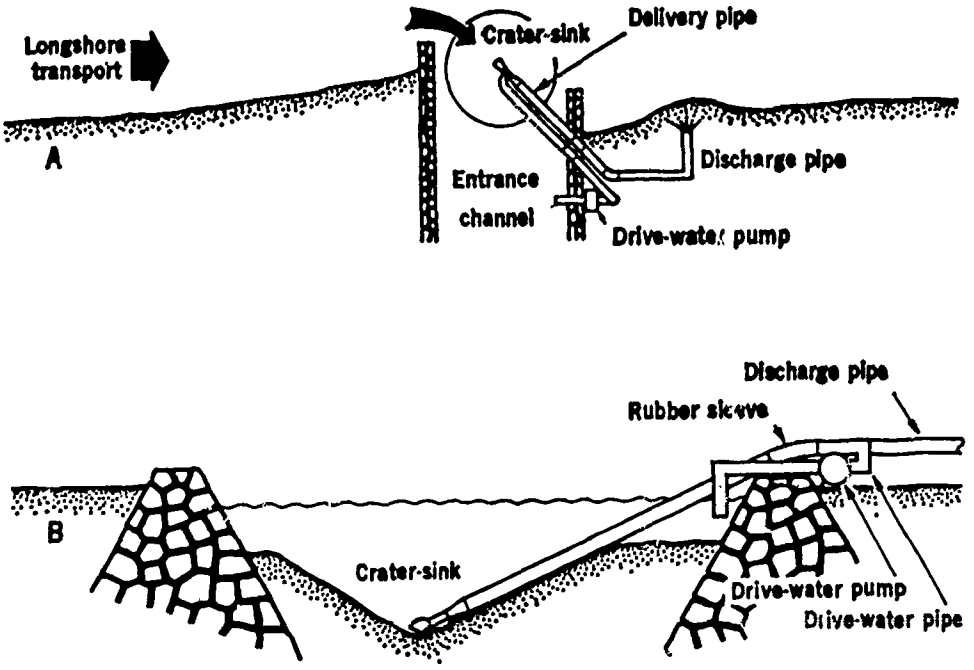


Fig. 13. The "crater-sink" sand transfer system, one of the systems under study for improving the bypassing of sand around harbors without requiring large entrapment basins and their accompanying offshore breakwaters: (A) plan of the entrance channel; (B) enlarged cross section. This system may be installed and operated at a relatively low cost. A jet pump (similar to a steam ejector) and a suction nozzle are located in the bottom of a crater-like depression in the sea floor which acts as a collecting basin for sand. The crater-sink assures that the water will be deep at the entrance. [From Inman and Harris (*51*)]

If resolute planning is undertaken at once, the needs of society in terms of the coastal zone may be served with a directed and justified meliorism. The history of efforts to influence the utility of coasts and harbors extends far back in time, but the concern for preservation and conservation has been a recent addition. Two types of efforts have been made: historical efforts made on a palliative local basis with limited tools and technology, and more recent undertakings characterized by emerging knowledge of basic principles combined with single-remedy technology. (This type of technology may solve the single problem but may also create other problems.)

The systems concept is now a mandate; the balance of nature has its corollary in coastal undertakings. Previous self-perpetuating mistakes not only have left visible scars, they also have affected the environment in ways easily detectable to a concerned observer. Any guidelines fundamental to coastal planning necessarily involve an understanding of the natural physical processes active in the environment. It has been shown that these processes are driven by primary interrelated forces that are essentially systematic and regular in form. This observation is borne out by recent findings that the extent of the mixing of water in the surf zone can be predicted from a knowledge of the breaker height and the width of the surf zone, and the longshore transport of sand is directly proportional to the longshore component of the energy flux of the incident waves. Thus a coherent approach to the formulation of unifying planning criteria seems clearly within our grasp; and it is becoming apparent that the driving forces (that is, the nearshore "climate" which consists of waves, winds, and current in nearshore waters) and the budget of sediment in a given coastal region are the principal environmental measurements that must be assessed for effective planning.

At least three distinct approaches are necessary if we are to achieve the overall goal of determining the essential qualities of unifying criteria: (i) specific studies of phenomena vital to our understanding of nearshore processes, (ii) the development of the sensors and systems for data-handling that permit effective monitoring of coastal climate and sediment transport, and (iii) the development of new planning criteria and the dissemination of information on known processes.

Coastal communities are presently in the curious position of rapidly acquiring and improving beach frontage while at the same time they lack criteria for evaluating the likelihood that the beach will still be in existence in 10 or 20 years. Certainly, the future of any coastal man-made structure placed in the path of the longshore movement in a littoral cell (Fig. 10) is questionable, and great reservations should accompany any commitment to build such a structure. Aerial photographs of Miami Beach, Florida, or Cape May, New Jersey, show the abuse to the coastline that can result when cascades of groins (Fig. 12) are erected without a master plan.

It is imperative that we develop the means to preserve the beaches and harbors that we now have and that we develop practical techniques for creating new beaches and nearshore structures that are less damaging to the environment. From an environmental standpoint there are three fundamental steps necessary for the good design of coastal structures: (i) identification of the important processes operative in an environment; (ii) understanding of their relative importance and their mutual interactions, and (iii) the correct analysis of their interaction with the contemplated design. To some extent we have considered all of these factors in earlier sections of this article, the emphasis being on the first two. There is no substitution for direct measurements in identifying and determining the relative importance of the various environmental parameters. It is also necessary that measurements be continued over a sufficient length of time so that predictions based on an earlier series of measurements can be tested for agreement with a subsequent series.

The need to develop new technologies to cope with specific problems is urgent. This type of development will likely be achieved simply because the need is specific and urgent, and there is a material objective. The stronger basic challenge lies in our ability to formulate satisfactory criteria for long-range planning and to develop an effective procedure for disseminating and implementing these criteria. It is now clear that man can no longer treat bits and pieces of a coast as individual entities; rather he must develop planning procedures that will include entire coastal zones and their adjacent ocean environments. This will require the development of planning criteria based on a far better under-

standing of both physical processes and environmental ecosystems than we now possess.

Human vanity does not encourage the recognition of failings, but one failing that must be recognized for survival is the fact that evolution has never prepared our species to think exponentially; this ability is a hard-won achievement of the disciplined mind. Cogent arguments abound for early and resolute planning in the coastal zone, with due allowance for the exponential hazards.

THE FREEWAY EFFECT

The freeway effect (growth breeds growth) occurred in California as a result of the construction of improved, limited-access roadways. These roads were intended to relieve traffic congestion. They caused, instead, increased use of the available roadways, and people changed their living habits to suit their convenience. The freeway effect may be noted in population growth, energy production, automobile and appliance design, and agriculture. The unidirectional animus specifically threatens the coastlines, because it encourages one to believe that it is beneficial to build unlimited numbers of marinas, to erect increasing numbers of power plants, to construct housing developments adjacent to existing housing developments, or to increase the number of drilling sites, or the number of commercial and shipping facilities with insufficient evaluation of possible alternatives.

If planning efforts are ineffective and ill-informed, then people are inclined to proceed with each of the foregoing proposals as though the others should give way before it. An informed and concerned public reaction of hitherto unknown magnitude may possibly lead to solutions for the problem of slowing and redirecting the machine, without wrecking the machinery; that is the coastal challenge.

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(40) On the assumption that the dissipation of lunar tidal energy in shallow water is 1.7×10^9kw, and that the ratio of the flux of solar to lunar tidal energy is the same as their torques, that is, 1:3.4. W. H. Munk and G. J. F. MacDonald [*The Rotation of the Earth* (Cambridge Univ. Press, London, 1960), p. 201] estimate the total dissipation of lunar tidal energy 2.7×10^9 kw, of which two-thirds is dissipated in shallow seas [G. R. Miller, thesis, University of California, San Diego (1964)].

(41) Average value from K. K. Turekian, in *Impingement of Man on the Oceans*, D. W. Hood, Ed. (Wiley, New York, 1971), chap 2, pp. 9–72, based on data of D. A. Livingstone [*U.S. Geol. Surv. Prof. Pap. 440–G* (1963), p. 64], O. A. Alegin and L. V. Brazhnikova [*Gidrokhim. Mater.* 32, 12 (1961)], and J. N. Holeman [*Water Resour. Res.* 4, 737 (1968)].
(42) R. M. Garrels and F. T. Mackenzie, *Evolution of Sedimentary Rocks* (Norton, New York, 1971), table 5.1.
(43) On the assumption that the total particulate load consists of 15 percent bed load and 85 percent suspended load, where values of the suspended load are averages from Garrels and Mackenzie (42), Turekian (41), and Holeman (41).
(44) U.S. Department of Commerce, *Statistical Abstracts of the United States, 1970* (Government Printing Office, Washington, D.C., ed. 91, 1970).
(45) Southern California Coastal Water Research Project, 1100 Glendon Avenue, Los Angeles 90024 (unpublished report, 1970).
(46) M. Eisenbud, *Science* 170, 706 (1970).
(47) E. D. Goldberg, *McGraw-Hill Yearbook of Science and Technology, 1970* (McGraw-Hill, New York, 1971), pp. 65–73.
(48) D. D. Smith and R. P. Brown, "Ocean Disposal of Barge-Delivered Liquid and Solid Wastes from U.S. Coastal Cities," report prepared for the Environmental Protection Agency by the Dillingham Corporation, La Jolla, California (1971); M. G. Grass, in *Man's Impact on Terrestrial and Oceanic Ecosystems*, W. H. Matthews, F. Smith, E. D. Goldberg, Eds. (M.I.T. Press, Cambridge, Mass., 1971), pp. 252–260.
(49) "Disposal of Dredge Fill," report to the U.S. Congress by the Chief of Engineers, U.S. Army (unpublished report, 1971).
(50) V. E. McClure and I. Barrett, in *Baseline Studies of Pollutants in the Marine Environment*, E. D. Goldberg, workshop chairman (National Science Workshop, Brookhaven National Laboratory, New York, 1972), pp. 493–497.
(51) D. L. Inman and R. W. Harris, *Proceedings of the Twelfth Coastal Engineering Conference* (American Society of Civil Engineers, New York, 1970), pp. 919–933.
(52) This work was sponsored by the National Oceanic and Atmospheric Administration, Office of Sea Grant, under grant 04–3–158–22 with the Institute of Marine Resources, University of California. The background knowledge of basic mechanisms described in this study evolved under long-range support by the Office of Naval Research and the Coastal Engineering Research Center, U.S. Army Corps of Engineers, with the Scripps Institution of Oceanography, University of California, La Jolla.

[From the Wall Street Journal, Jan. 6, 1969]

GET OUT OF MY SAND: DISPUTES FLARE OVER PUBLIC USE OF BEACHES—OREGON CASE TESTS OWNERSHIP OF "DRY SAND"; IS MARYLAND COTTAGE "PUBLIC NUISANCE"?

(By William H. McAllister, Staff Reporter of The Wall Street Journal)

CANNON BEACH, ORE.—A new argument for joining Polar Bear clubs: Plunging into the icy waters now may be your last chance to go swimming at your favorite beach.

In several localities around the country, fights have flared recently over moves by private property owners to close off beaches that had been assumed to be open to public use. And many people on both sides of the controversies think such moves could spread—depending partly on the outcome of court cases in Oregon and Maryland that may possibly be decided this winter.

The Oregon case is perhaps the most important, and it illustrates the legal principles involved. Up to 1966, most Oregonians had taken for granted that they could swim anywhere along the state's broad, sandy beaches, under a 1914 law designating the beaches "public highways." But then William G. Hay opened the 81-unit Surfsand Motel at Cannon Beach and put up signs warning non-guests to keep off a 200-foot-by-80-foot section of sand in front of the motel.

Mr. Hay contends the public may have a right to swim—but not to cross the sand to get to the water. He and his lawyer discovered that the Oregon

law, like beach laws in many other states, reserves for public use only the "wet sand" portion of the beach, between mean low-tide and mean high-tide lines (the principle that wet sand is open to public use dates back to English common law). Thus Mr. Hay insists, owners of coastal property have a clear right to keep the public off the "dry sand" portion of beaches—everything above mean high-tide level. "Just because it's sand doesn't mean it has to belong to the public," says Mr. Hay.

AN "IMPLIED DEDICATION"

An Oregon circuit-court judge has since disagreed, in a decision that a real-estate developer had no authority to build a private road over a section of another beach. The judge declared that the public's continued and unchallenged use of Oregon's beaches over many years had created an "implied dedication" of the dry-sand areas of beaches to public use, too. An appeal from that decision is now pending before the Oregon supreme court.

If the decision is reversed, continued public use of many Oregon beaches apparently will depend on the fate of a $15 million bond issue that Gov. Tom McCall announced last week he will ask the legislature to approve. The money would be used to buy some "dry-sand" beach property and other potential park areas.

Oregon voters earlier defeated a proposed $30 million bond issue that would have given Oregon funds to buy up the dry-sand portion of the state's coastline. Opponents of the issue had argued that the money would only reward speculators in beach-front property that the public has a right to use free under the "implied dedication" decision. "It's quite obvious that if we (the public) own it, we shouldn't have to pay for it," says Willis West, a Portland lawyer.

MARYLAND DISPUTE

A similar fight is in progress in Maryland. Hamilton Fox, a lawyer, is trying to get a state court to declare that a cottage recently built on pilings at the water's edge on the beach at Ocean City is a "public nuisance" and should be removed. "It's going to have tremendous implications if we lost," says Mr. Fox. He fears that if the court declares the cottage owner has a right to keep his building on the beach, other coastal-property owners in the state "will build little fences down to the water and the people of Maryland won't have anywhere to swim."

A group of conservationists in Sonoma County, Calif., north of San Francisco, has similar fears. Aroused by plans of builders of the Sea Ranch resort development too close to the public several beaches on a 10-mile stretch of coast, the group sponsored a proposal to have the county build access roads to the wet-sand portions of beaches at one-mile intervals along the coastline.

Oceanic Properties, Inc., a subsidiary of Castle & Cooke Inc. of Honolulu and developer of Sea Ranch, persuaded Sonoma County voters to defeat the proposal. A spokesman for Oceanic Properties contended the access roads would be "alleys to nowhere" since, he said, much of the coast was unsuitable for swimming. Oceanic Properties also threatened to withdraw its offer to provide land for a 126-acre public park at the northern end of the 5,000-acre Sea Ranch development if the access-road proposal were approved.

Advocates of public use of beaches have won some other fights. Last August, the Rhode Island supreme court ordered the Spouting Rock Beach Association in Newport to take down a chain-link fence it had built across the end of a street, blocking access to Bailey's Beach. The court called the fence an "obstruction of a public way."

[From Harper's Magazine, August 1973]

WE SHALL FIGHT THEM ON THE BEACHES * * *

(By Anthony Wolff)

Once again we are in the season of the summer solstice, the high season in the temperate zone, when all mankind heads for the beach. Pale flesh and desiccated spirits yearn to be rebaptized. In this ecumenical rite we are a nation of fundamentalists: nothing less than total immersion in salt water will redeem us.

Inevitably, however, the pilgrimage turns into an ordeal. The mass migrations to the beach get stalled in a summer-long traffic jam that hardens into an unmoving mass of hot metal and boiling frustration on the weekends. There are simply too many people heading for too little beach at the same time.

On holidays, many spend the day oozing along the coast from one public beach to the next in a vain search for a parking place. The lucky ones end up herded together on the sand like seals in a rookery, oiled and broiling in indecent proximity to the whole population they presumably came so far to get away from.

More and more, increasingly leisured and mobile Americans seem to expect access to the beach as something corollary to a constitutional right. But, with 50 percent of us living within fifty miles of a coast, the public beaches are already inadequite to the demand. Even so, the government further incites the public lust for the seashore by building better highways and by tampering with traditional holidays to prolong summer weekends.

In the face of this growing demand—indeed largely in response to it—the supply of beach open to the public is shrinking even further. Private beach owners and municipalities endowed with town beaches—even those that have always been permissive about peaceable trespass—are in arms against an imminent invasion. At best, they foresee masses of alien refugees from the urban prison. At worst, they fear vagrant hordes of freeloading, long-haired barbarians who will smoke pot and fornicate on the sand without even paying property taxes.

So everywhere more and more underpopulated beachfront is posted against trespass and patrolled by intolerant gendarmes. Landlords extend walls or fences across their dry-sand beaches to the waterline. Elaborate security systems restrict municipal beaches to town residents; official windshield stickers are required at parking lots, while nearby roadside parking is prohibited. More liberal towns charge non-residents parking fees as high as $15 for a single visit. Pedestrian access to the beach is secured by plastic-laminated ID cards or numbered dog tags or bracelets. "Our facilities are already overcrowded and overutilized," complained an official of one Long Island county last summer. "We have all we can do to preserve the best facilities for our own residents."

This annual summer impasse is developing into a confrontation between the public and the proprietors, who are determined to hold their private beaches for themselves. The real struggle over the beaches, however, is taking place away from the sand, in the courts and legislatures of almost every coastal state.

On the map, the simple fact is that we have plenty of seashore to go around. We are no land-locked Switzerland, but a nation of coasts. Even if all 210 million of us went to the beach in a legion, we could get wet together. To be precise, there would be 2,102 feet of ocean frontage for each of us—enough to wade in abreast, arm-in-arm, in a continental chorus line.

Looking seaward from any point along our 83,633 miles of seacoast, the entire prospect is the public's domain. The seamless sea tolerates no landlords, its heaving surface suffers no property lines. Inshore of international deep-water, the ocean belongs to all of us in common, held in trust for us by the state.

The law that guarantees the ocean to the people might seem to imply their right of access to it; but what the law implies, the law denies. The common property ends on the foreshore, where water and land overlap with the advance and retreat of the tides. Almost everywhere in the United States, the beach above high water is as subject to subdivision and private ownership as any woodland tract or urban house lot. The beach is simply real estate, and the legal fact makes the public's right to the ocean a nullity.

Such a paradox seems offensive not only to good law, but to good sense as well. The sand itself will not acquiesce. It will not lie still, be domesticated, be fixed with this man's title, or that. A boundary line on the beach, even a stone wall, is doomed to be erased at the whim of wind or waves. The sand belonging to one man on Sunday may migrate to his neighbor's beach on Monday, impartially enriching the one at the other's expense. A legally surveyed sand estate shrinks and swells by natural erosion, so that one day its landlord

owns so much of it; but some day later he may own twice as much, or half. Such vagrant real estate makes a poor foundation for fixed improvements: many a beach castle built on sand will not survive a long-term mortgage.

But the law's the law, at least as long as the beach holds still for it, and three-and-a-half centuries of seashore free enterprise have left only the odds and ends of sand open to the public. Today, even Robinson Crusoe would likely be hauled in for trespassing. In theory at least, a foundering swimmer, finding himself offshore of some private beach at high tide, must marinate in the public waves until the ebb tide affords him a narrow legal right-of-way to the nearest unrestricted stretch of sand. If this seems far-fetched, there is the case of Greenwich, Connecticut, where just last summer, an imprudent yachtsman rowing ashore for dinner made the mistake of beaching his dinghy on private sand. The local constabulary, who would not let him recross the beach on his way home, politely advised him to swim back to his mooring from the nearest public beach.

The more serious shortage of public beaches for recreation was officially documented as long ago as 1964, when Congress commissioned the National Park Service to survey the entire Atlantic and Gulf coasts—the 3,700-mile ocean frontage of nineteen states—for potential public beach sites. The title of the resulting report bespoke its conclusions: it was called *Our Vanishing Shoreline.*

The survey found only 6.5 percent of the shoreline in state or federal ownership. Of that, more than one-third was concentrated in three national preserves: Acadia National Park, off the coast of Maine; Everglades, at the southern tip of Florida; and the newly established National Seashore at Cape Hatteras, North Carolina. (Twenty years later, additional Atlantic coast seashores are in various stages of incompletion at Cape Cod, the entrance to New York Harbor and Cumberland Island, Georgia.) Even in 1964 there was a race against private interests for what was left.

Many of the West Coast beaches are similarly sequestered from the public. According to a report by a Ralph Nader study group, "Of the 1,072 miles of California coast, . . . only 290 are beaches suitable for swimming. Only 90 of these miles are publicly owned, and most of this (53 miles) is held in military bases."

The problem of public exclusion from an increasing amount of recreational ocean frontage is aggravated by the preemption of vast expanses of beach for non-recreational purposes. Municipal dumps, power plants, and a variety of industrial facilities, many of them major polluters, have long occupied choice waterfront sites. Cities have habitually diluted their sewage in the nearest ocean, making miles of beach unfit for swimming.

Against this nationwide trend toward closed beaches, the eport to enlarge public access to the seashore has been gathering legal and popular force for almost a decade. The first significant court case was decided in Texas in 1964, when the Attorney General sued a corporation that had barricaded its property from the vegetation line down to the water's edge. The state charged a violation of the Texas "open beaches" law, which promised the public "free and unrestricted ingress and egress" over the shore to the Gulf of Mexico. The star witness was one of the area's oldest residents, whose childhood recollections of stories told by his father convinced the court that the beach in dispute had been used for generations as a public right-of-way. The court ruled that the beach owner's long acquiescence in public passage over his property constituted an irrevocable "implied dedication" of the beach to pedestrian traffic. Arriving at the same conclusion from the opposite direction, the court found that the public, by its overt use of the beach over a long period of time, had acquired a "prescriptive easement" legitimating its trespass.

A Florida court concurred in a ruling denying the right of an amusement pier proprietor in Daytona Beach to build a tower on his own adjacent beach. The court noted that "For more than twenty years . . . the general public . . . had actually, continuously, and uninterruptedly used and enjoyed the soft sand area of the beach . . . The public's use of the area . . . was open, notorious, visible . . . and without material challenge or interference by anyone purporting to be the owner of the land." The court also found it significant that the city's funds had been used to maintain the area. The owner was required to tear down his tower.

These siamese-twin doctrines of "implied dedication" and "prescriptive easement" gave public-access activists hope—and private beach owners fear—that long and uncontested public use of private beaches would be ratified by the courts. But it also raised the exhausting and expensive prospect of litigating the question for each contested section of beach everywhere.

Meanwhile, in a 1969 decision, the Oregon Supreme Court had obviated this problem in its jurisdiction. In affirming the public's right of access to the state's beaches, the court appropriated the English legal doctrine of "customary use"—according to Blackstone, of such long standing "that the memory of man runneth not to the contrary." Opening not only the contested beach but the entire Oregon coast to public use, the court insisted, "This land has been used by the public as public recreational land according to an unbroken custom running back in time as long as this land has been inhabited."

But these arguments have little currency in the crowded Northeast, where beach access is most fiercely contested. The beachfront there has more than 300 years of continuously recorded title to protect it from casual usurpation; and the "customary use" has most often been the vigilant denial of public access. Therefore, the lawyers and legislators pressing the matter in the Northeast have applied established legal arguments to only the most vulnerable denial of public access: the special case of municipal beaches that discriminate against non-residents.

Lawrence Sager, the young American Civil Liberties Union advocate who is calling the legal signals observes, "It may not be a bad idea for public-interest lawyers to fashion ingenious traditional arguments." Sager's landmark case thus far was a successful suit last summer against the City of Long Beach, on Long Island. The city had suddenly imposed a residents-only restriction on a town beach that was more than big enough for its own needs, and which had previously been open to the general public since the town acquired it in 1937.

In his 86-page textbook brief, alternating citations of legal precedent with appeals for social justice, Sager proposed four basic grounds for overturning the Long Beach regulation. The first was the broad doctrine of *jus publicum*: in this instance, that the state holds title to the tidal lands for the use and benefit of its citizens; and that a town, being a creature of the state, cannot contravene the purposes of the state in administering the adjacent dry-sand beach. Sager also claimed constitutional support for free access, on the ground that the arbitrary exclusion of non-residents discriminates unreasonably against a class of people, in violation of the guarantees of due process and equal protection. In his third argument, Sager pointed out that most of the beach has been built up over the years by man-made erosion control projects. Dry-sand beach has thus been built on tidal lands of which the state is the trustee for the people: therefore, the beach belongs to the people in the first place.

Avoiding these pretty points, however, the Supreme Court of Nassau County took refuge in Sager's narrowest argument: that by allowing open access for thirty-five years, the town had created an irrevocable "public trust." The court notably ignored a much broader interpretation of "public trust" developed the year before in the New Jersey case of *Neptune City* v. *Avon-by-the-Sea*. At issue was the right of Avon-by-the-Sea to charge non-residents a higher fee than residents at its town beach. The New Jersey Supreme Court ruled that "the public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without preference."

Nevertheless, with two related cases coming up this summer, Sager is sure that *Long Beach* "will establish the legal basis to open all the town beaches in New York State." After that, he sees the battle spreading from publicly owned town beaches to such privately owned "public accommodations" as seaside resorts, beach clubs, and marinas; and ultimately even to beaches owned by individuals.

Curiously, the most potentially far-reaching proposal to open all the beaches to all the people is in conservative Massachusetts, where the mere notion of trespass is heretical to an ancient and elaborate tradition of orthodox private-property rights. As early as 1614, the Massachusetts Colony Ordinance gave landowners exclusive rights to the beach all the way to the low-water line—rather than to the high-water mark, as in most other coastal colonies—subject only to the public's right of navigation and "free fishing and fowling."

In other states, the courts in more modern times have placed a liberal construction on such ancient guarantees of limited public access. The New Jersey Supreme Court in *Avon-by-the-Sea*, for instance, concluded that the early law should be judicially enlarged "to meet changing conditions and needs of the public it was created to benefit." The Supreme Court of California ruled, "The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. . . . The state is not burdened with an outmoded classification favoring one mode of utilization over another."

Not so the Massachusetts courts, however. "We think that there is a right to swim or float in or upon public waters as well as to sail upon them," one opinion allowed, "But we do not think that this includes a right to use for bathing purposes . . . that part of the beach or shore above the low-water mark." After 350 years of such strict construction of the Colony Ordinance, only 285 miles of the Commonwealth's 1200-mile shoreline are open for public recreation. Fifty of them are on the relatively remote Nantucket Sound Islands, and only twenty-five are in the Greater Boston area.

But while the Massachusetts courts steadfastly resist innovations, State Senator William M. Bulger is pushing Senate Bill 804 in the legislature. In its original form, the entire bill is only ten lines long; the operative couple states simply that "the public shall have an on-foot right-of-passage along the coastline of the commonwealth below the vegetation line."

Though he is an urban populist, with a large, solid South Boston constituency, Bulger is sensitive to the possessive instincts of Massachusetts beach owners, who will not silently suffer the footprints of strangers on their private sands. So he never fails to insist in public that the limit of his intentions is a "lateral right of passage": that is, anyone with legal access to any part of the shoreline, private or public, would have the additional right to promenade along the private dry-sand frontage of others. He is quick to add that his bill "does not give access to reach beaches over private property"; nor does it "provide that citizens can lay a blanket and have lunch in those areas." The Senator has assured the dubious that his bill will stall more radical proposals from less moderate men.

There are moments, however, when Senator Bulger begins to sound a lot like the ACLU's Larry Sager. Both recognize attempts by suburbanites to keep city visitors off their beaches as what Sager calls "part of a whole syndorme of suburban exclusionary practices" designed to insulate the satellite suburbs from the economic and cultural problems of the cities. Sager notes often that Westchester taxpayers are not barred from equal access to New York City's museums and other amenities; Bulger says, "My constituents wouldn't think of denying out-of-towners access to Boston Common." In the context of the traditional New England town plan—small private lots clustered around the Common—Bulger prophesies, "We can't much longer enjoy the selfish ownership of beaches by a few people." He says, "What the hell good are they if we can't get to 'em?"

Meanwhile, the question of the public's interest in the shoreline is being raised elsewhere, everywhere. In Connecticut, the Civil Liberties Union has put seaside towns on notice that it is considering which one to sue first for open beaches. California voters recently passed a referendum, Proposition 20, calling for the management of the state's entire shoreline for the public benefit. States like Delaware, Florida, and New Jersey as well as the federal government, are taking an intense interest in both conserving and liberating their seacoasts; and where a government interest is established, public access is bound to follow. The difference may not be everywhere apparent as early as this summer, or even next, but it seems certain that in the foreseeable future urban refugees will find increasing expanses of beach open to them.

The time has come: as the Scottish essayist Thomas Carlyle warned a nineteenth-century America of 25 million people, "You won't have any trouble in your country as long as you have few people and much land, but when you have many people and little land, your trials will begin." We have by now just about exhausted the frontier. We are turned back upon ourselves, a prodigal nation newly poor in unspoiled places, looking for last resorts where we can revive ourselves. There's no telling where the search may end: the beaches are only the beginning.

In the District Court of Galveston County, Tex., 122d Judicial District
No. 108,156

JOHN L. HILL, ATTORNEY GENERAL OF TEXAS, ET AL

v.

WEST BEACH ENCROACHMENT, ET AL

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION

To the Honorable Judge of Said Court: Comes now John L. Hill, in his capacity as Attorney General of the State of Texas, and as successor to Crawford C. Martin, former Attorney General, and comes also Jules Damiani, Jr., Criminal District Attorney of Galveston County, Texas, hereinafter referred to as Plaintiffs, and on behalf of the people of the State of Texas, make and file this their Plaintiff's First Amended Original Petition, complaining of those Defendants whose names are set forth on the list attached hereto as Exhibit "A", which exhibit is made a part hereof and incorporated herein by reference as though fully set forth verbatim herein, and for cause of action would show the Court as follows:

I

This suit is brought by the said John L. Hill, Attorney General of the State of Texas, and Jules Damiani, Jr., Criminal District Attorney of the State of Texas pursuant to the authority and duty conferred upon them and in conformance with the legislative directive contained in Acts 1959, 56th Legislature of the State of Texas, second called session page 108, Chapter 19, now codified as Article 5415d, Vernon's Texas Civil Statutes, as originally enacted, and thereafter amended. The suit is brought to establish the fact that the people of Texas have an easement on, over, along and across a portion of the beach along the Gulf of Mexico on Galveston Island giving them access to the State-owned seashore and waters of the Gulf and for injunction enjoining the erection by defendants of structures of any kind on said easement area, and mandatorily enjoining the defendants to remove all structures or improvements of any kind upon such area. The easement is one in the public to use the area of land adjoining the waters of the Gulf of Mexico from the line of mean low tide to the line of vegetation for pedestrian and vehicular travel, for camping and picnicking, and to make use of the area as a means of access to and the full use and enjoyment of the sovereign-owned shore and waters of the Gulf of Mexico for swimming, boating and fishing, and other like uses.

II

The Defendants are those persons, firms, corporations, associations and legal entities whose names are set forth in Exhibit "A" attached hereto. The Defendants whose names are set forth in Exhibit "B" attached hereto have already been served with citation and have answered and appeared herein. The Defendants whose names are set forth in Exhibit "C" attached hereto have been served with citation, but have not appeared and answered. The Defendants whose names and addresses are set forth in Exhibit "D" attached hereto have not been served with citation. Accordingly, Plaintiffs ask that the Defendants whose names and addresses are set forth in Exhibit "D" attached hereto be served with citation herein in accordance with law. Service of citation upon these Defendants may be had by serving them at the addresses set forth in Exhibit "D".

III

The Defendants herein are the owners of or claimants of other interest in certain land or real property abutting upon, contiguous with or lying in the vicinity of the State-owned beaches bordering on the seaward shore of the Gulf of Mexico in the area of Galveston County, Texas, commonly known as "West Beach," extending from the westerly end of the Galveston seawall to the west end of Galveston Island. These Defendants, and particularly the developer defendants, have erected and they or their successors now control and maintain various fences, barriers, bulkheads, picnic and eating places, clubhouses, and other structures or improvements upon that area of "West

Beach" in Galveston County, Texas, lying between the line of mean low tide and the line of vegetation bordering on the seaward shore and beach of the Gulf of Mexico.

IV

The Plaintiffs would show to the Court that the public has acquired a right of use or easement to the area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico by prescription, dedication, and has retained a right by virtue of continuous rights in the public since time immemorial, as recognized in law and custom. Accordingly, Plaintiffs would show that whatever rights Defendants have in and to that area of "West Beach" of Galveston County, Texas, being the area of beach extending from the west end of the Galveston seawall and the west end of Galveston Island and lying between the line of mean low tide and the line of vegetation bordering on the seaward shore of the Gulf of Mexico, where the structures heretofore described have been erected, are subordinate and subject to the right of use of such property by the people of the State of Texas and the public generally for pedestrian and vehicular travel, for camping and picnicking, and to make use of the area as a means of access to and the full use and enjoyment of the sovereign-owned shore and waters of the Gulf of Mexico for swimming, boating and fishing, and other like uses. The bases for the assertion of these superior rights in the people are:

(1) The public has acquired such rights by prescription, dedication, and by retention of a right by virtue of continuous rights in the public since time immemorial, as recognized in law and custom.

(2) Before, at, and continuously since said area above described was patented by the Republic of Texas, said area was and has been at all times used by the people for the purposes above stated without overt challenge, question or interruption until the structures complained of had been erected and such rights thereby became a part of our time honored custom and common law.

(3) Traditionally the sovereign has held the seashore as trustee for the use of the people. The beach, being that area between the mean low tide and the line of vegetation, is, like the air of the atmosphere and the water of the oceans, not subject to such individual ownership as would preclude the rights of the public to use such beach generally for camping and picnicking and as a means of access to and the full use and enjoyment of the sovereign-owned shore and waters of the Gulf of Mexico for swimming, boating, fishing, and other like uses, and as a public way for pedestrians and vehicular traffic.

(4) At, and before the time of said land being patented, as aforesaid, said area was impliedly dedicated by the Defendants' predecessors in title as a public way, and for the other purposes above stated, and said implied dedication has been accepted and said dedication has been designated upon official maps of this State, and therefore the Defendants' ownership of said property is necessarily subject and subordinate to the rights now vested in the people of the State of Texas to the full enjoyment and use of said area of "West Beach" in Galveston County, Texas, lying between the line of mean low tide and the line of vegetation.

(5) For more than twenty-five years next preceding the erection of the structures above described public funds have been expended by Galveston County for maintaining the area free of debris and other obstructions, and policing the area, which fact was known, or, in the exercise of reasonable diligence, should have been known, to Defendants and their predecessors in title, and they have knowingly accepted the benefits of such expenditures and are estopped from denying such rights of the public.

(6) The people and public of the State of Texas have been exercising said rights in and to said area and have so used said premises for more than ten years next preceding the construction of said structures, which use has been open, notorious, continuous, uninterrupted, under claim of right, peaceful, exclusive, and adverse to the rights of Defendants and their predecessors in title, and such rights and use have thereby ripened into an easement by prescription, said easement by prescription extending from the line of mean low tide to the line of vegetation along "West Beach".

(7) There has been, prior to the erection of the structures in question and the bringing of this suit, both an express and implied dedication of that area extending from the line of mean low tide to the line of vegetation bordering on the shore and beach of the Gulf of Mexico, along "West Beach."

V

Certain Defendants have no barriers, obstructions or structures on the beach. As to these Defendants, and as to the other Defendants in addition to the mandatory injunctive relief sought, the State of Texas and its people by and through the Attorney General also bring this action under the Texas Uniform Declaratory Judgment Act, Art. 2524-1 of the Revised Civil Statutes of Texas. The Attorney General would respectfully show that he and the people of Texas are entitled to a declaratory judgment against the Defendants decreeing that, as to that area of "West Beach" previously described the people of Texas have an easement on, over, along and across the beach giving them access to the State-owned seashore and waters of the Gulf, the easement being one in the public to use this area of the beach from the line of mean low tide to the line of vegetation for pedestrian and vehicular travel, for camping and picnicking, and to make use of the area as a means of access to and the full use and enjoyment of the sovereign-owned shore and waters of the Gulf of Mexico for swimming, boating and fishing, and other like uses. The Plaintiffs also seek declaratory judgment decreeing that they have such regulatory powers upon such beach as are provided under the statutes of the State of Texas. Plaintiffs respectfully request that this judgment be made binding upon the Defendants, their heirs, and assigns forever, and the judgment be in rem against the land.

VI

The Plaintiffs further allege that in the case of the Attorney General of Texas, et al v. Seaway Company, Inc., being Cause No. 93,782 on the docket of this Honorable Court, judgment was rendered in favor of Plaintiffs, based upon a jury verdict, on the 6th day of June, 1961, and that one paragraph of said judgment (on page 21 thereof), provided as follows: "IT IS ORDERED, ADJUDGED AND DECREED by the Court that the public has acquired a right of use and easement to and over the Beach bordering on the Gulf of Mexico as defined in Article 5415d of Vernon's Texas Civil Statutes, being the beach area between the line of mean low tide and the vegetation line, along Section 12 of the Jones and Hall Grant on Galveston Island, by prescription, and by dedication, and has retained a right of use and easement to and over said Beach area by virtue of continuous right in the public."

At the time of the arial and judgment in such case, defendant Seaway Company, Inc. was the owner of such property and such judgment is binding on such defendant and its successors in ownership of said Section 12 of the Jones and Hall Grant on Galveston Island.

Said judgment was affirmed by the Court of Civil Appeals for the 1st Supreme Judicial District, its decision being reported in 375 S.W. 2d 928, entitled *Seaway Company Inc v. Attorney General of the State of Texas, et al* and writ of error in such cause was denied by the Supreme Court of Texas, n.r.e. By virtue thereof said judgment became final and is binding on the present owners of said Section 12 of said Jones and Hall Grant.

VII

Plaintiffs would show to the Court that the maintenance of each and all of the structures hereinabove described is illegal and against the public policy of this State in that they interfere with the free and unrestricted rights of the public, individually and collectively, to the free and uninterrupted use of that area of "West Beach" of Galveston County, Texas, in which the public has acquired the rights hereinabove described. The Court should issue its mandatory injunction ordering the Defendants to remove such obstructions and structures from such area of "West Beach", and to place the ground whereon such obstructions and structures now stand in the same condition that existed prior to the construction of such items. The Defendants should be permanently enjoined from erecting other structures, of any kind, on their portion of "West Beach" in Galveston County, Texas, that lies between the line of mean low tide and the line of vegetation.

VIII

In all cases in this petition where the term "line of vegetation" is used, is meant the line of vegetation as defined in Article 5415d, Vernon's Texas Civil Statutes, as originally enacted, and thereafter amended.

Wherefore, premises considered, plaintiffs pray that those Defendants who have not been served be served with citation herein, and that upon final trial and hearing hereof, Plaintiffs have judgment against Defendants decreeing, that, as to "West Beach" the people of Texas have an easement on, over, along and across that beach giving them access to the State-owned seashore and the waters of the Gulf, the easement being one in the public to use this area of the beach from the line of mean low tide to the line of vegetation for pedestrian and vehicular travel, for camping and picnicking, and to make use of the area as a means of access to and the full use and enjoyment of the sovereign-owned shore and waters of the Gulf of Mexico for swimming, boating and fishing, and other like uses, and that the Court permanently enjoin the Defendants from erecting structures, of any kind, on that portion of "West Beech" in Galveston County, Texas, that lies between the line of mean low tide and the line of vegetation, and that the Court further mandatorily enjoin the Defendants to remove any obstructions, barriers, bulkheads, fences, picnic and eating places, clubhouses, residences, or structures or improvements of any kind, upon that area of "West Beach" in Galveston County' Texas, lying between the line of mean low tide and the line of vegetation bordering on the seaward shore and beach of the Gulf of Mexico, and that all of the above relief requested shall apply to such area of the "West Beach" wherever the line of vegetation may be at anytime in the future, and that this judgment shall be binding upon the Defendants, their heirs and assigns forever, and that the judgment be in rem against the land, and the Plaintiffs have judgment for all costs of Court and for such other and further relief, both at law and in equity, both general and special, to which the Plaintiffs may be entitled.

Respectfully submitted,

JOHN L. HILL,
Attorney General of Texas.

LARRY F. YORK,
First Assistant Attorney General.

MIKE WILLATT,,
Assistant Attorney General.

J. ARTHUR SANDLIN,
Assistant Attorney General.

TERENCE O'ROURKE,
Assistant Attorney General,

JULES DAMIANI, JR.,
Criminal District Attorney,
Attorneys for Plaintiffs.

THE STATE OF TEXAS
County of Travis

Before me, the undersigned authority, on this day personally appeared Terence O'Rourke, who after being by me duly sworn, upon his oath deposes and says that he is familiar with the facts contained in the above and foregoing First Amended Original Petition of Plaintiffs, and that all facts alleged therein are true and correct.

TERENCE O'ROURKE,
Affiant.

Subscribed and sworn to before me on this the 26th day of September, 1973.

LOUISE MILLER,
Notary Public

[Committee note. The exhibits included in the foregoing petition have been placed in the files of the subcommittee.]

[Whereupon, at 2:21 p.m., the subcommittee was adjourned.]

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